Supreme Court, U.S.
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No.

In The
Supreme Court of the United States

ALOE ENERGY CORPORATION,
a Pennsylvania Corporation,
Petitioner,

v.

KENNETH APFEL, Commissioner
of Social Security,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

DAVID J. LAURENT
Counsel of Record
MATTHEW H. SMITH
BABST, CALLAND, CLEMENTS
AND ZOMNIR, P.C.
TWO GATEWAY CENTER
8TH FLOOR
PITTSBURGH, PA 15222
(412) 394-6440

Counsel for Petitioner

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

85pp

QUESTIONS PRESENTED

Whether the literal language of Section 9701(c)(2)(A) of the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. § 9701(c)(2)(A), which defines the term "related person" to include three specific types of persons who are related to a signatory operator and their successors in interest, is absurd and demonstrably at odds with Congress's intent if it is not also construed to also include the successors in interest of a signatory operator.

PARTIES TO THE PROCEEDINGS

The only parties to this proceeding are those identified in the caption.

Petitioner

Petitioner, Aloe Energy Corporation, is a wholly owned subsidiary of Aloe Mining Corporation. No publicly held company owns ten (10%) percent or more of Aloe Mining Corporation's stock.

Respondent

Kenneth Apfel, Commissioner of Social Security.

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OPINIONS BELOW

The opinion of the Court of Appeals (App. 1a)[1] is unreported, as are the opinions of the District Court and the Magistrate Judge whose recommendations were adopted by the District Court.

BASIS FOR JURISDICTION

The judgment of the Court of Appeals was entered on June 20, 2000. By Order dated September 11, 2000, Petitioner's request for an extension of time within which to file a Petition for Writ of Certiorari was extended to and including November 2, 2000. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. § 9701 *et seq.*

Section 9701

(c)(1) Signatory Operator. The term "signatory operator" means a person which is or was signatory to a Coal Wage Agreement.

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[1] All citations to "App." herein are to the Appendix to this Petition.

(c)(2) Related persons. (A) In general. A person shall be considered to be a related person to a signatory operator if that person is –

(i) a member of the controlled group of corporations (within the meaning of section 52(a)) which includes such signatory operator;

(ii) a trade or business which is under common control (as determined under section 52(b)) with such signatory operator; or

(iii) any other person who is identified as having a partnership interest or joint venture with a signatory operator in a business within the coal industry, but only if such business employed eligible beneficiaries, except that this clause shall not apply to a person whose only interest is as a limited partner.

A related person shall also include a successor in interest of any person described in clause (i), (ii), or (iii).

(B) Time for determination. The relationships described in clauses (i), (ii), and (iii) of subparagraph (A) shall be determined as of July 20, 1992, except that if, on July 20, 1992, a signatory operator is no longer in business, the relationships shall be determined as of the time immediately before such operator ceased to be in business.

(3) 1988 agreement operator. The term "1988 agreement operator" means –

(A) a signatory operator which was signatory to the 1988 National Bituminous Coal Wage Agreement ....

(4) Last signatory operator. The term "last signatory operator" means, with respect to a coal industry retiree, a signatory operator which was the most recent coal industry employer of such retiree.

Section 9706

(a) In general. For purposes of this chapter, the Commissioner of Social Security shall, before October 1, 1993, assign each coal industry retiree who is an eligible beneficiary to a signatory operator which (or any related person with respect to which) remains in business in the following order:

(1) First, to the signatory operator which –

(A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and

(B) was the most recent signatory operator to employ the coal industry retiree in the coal industry for at least 2 years.

(2) Second, if the retiree is not assigned under paragraph (1), to the signatory operator which --

(A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and

(B) was the most recent signatory operator to employ the coal industry retiree in the coal industry.

(3) Third, if the retiree is not assigned under paragraph (1) or (2), to the signatory operator which employed the coal industry retiree in the coal industry for a

longer period of time than any other signatory operator prior to the effective date of the 1978 coal wage agreement.

(b) Rules relating to employment and reassignment upon purchase. For purposes of subsection (a) –

(1) Aggregation rules. (A) Related persons. Any employment of a coal industry retiree in the coal industry by a signatory operator shall be treated as employment by any related persons to such operator....

(B) Certain employment disregarded. Employment with-- (i) a person which is (and all related persons with respect to which are) no longer in business....

(2) Reassignment upon purchase. If a person becomes a successor of an assigned operator after the enactment date, the assigned operator may transfer the assignment of an eligible beneficiary under subsection (a) to such successor; and such successor shall be treated as the assigned operator with respect to such eligible beneficiary for purposes of this chapter. Notwithstanding the preceding sentence, the assigned operator transferring such assignment (and any related person) shall remain the guarantor of the benefits provided to the eligible beneficiary under this chapter. An assigned operator shall notify the trustees of the Combined Fund of any transfer described in this paragraph.

Section 9711

(g) For purposes of this part and part II[2]–

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[2] Parts I and II are Sections 9711 and 9712 of the Coal Act, 26 U.S.C. §9711 and 9712, respectively.

(1) **Successor.** The term "last signatory operator" shall include a successor in interest of such operator.

(2) **Reassignment upon purchase.** If a person becomes a successor of a last signatory operator after the enactment date, the last signatory operator may transfer any liability of such operator under this chapter with respect to an eligible beneficiary to such successor, and such successor shall be treated as the last signatory operator with respect to such eligible beneficiary for purposes of this chapter. Notwithstanding the preceding sentence, the last signatory operator transferring such assignment (and any related person) shall remain the guarantor of the benefits provided to the eligible beneficiary under this chapter. Any last signatory operator shall notify the trustees of the 1992 UMWA Benefit Plan of any transfer described in this paragraph.

Energy Policy Act of 1992, P.L. 102-486, § 19142, 106 Stat. 3037, Subtitle C - Health Care of Coal Miners

Section 19192. Findings and Declaration of Policy

(a) **Findings**.--The Congress finds that-

(1) the production, transportation, and use of coal substantially affects interstate and foreign commerce and the national public interest; and

(2) in order to secure the stability of interstate commerce, it is necessary to modify the current private health care benefit plan structure for retirees in the coal industry to identify persons most responsible for plan liabilities in order to stabilize plan funding and allow for the provision of health care benefits to such retirees.

(b) **Statement of Policy**.--It is the policy of this subtitle–

(1) to remedy problems with the provision and funding of health care benefits with respect to the beneficiaries of multiemployer benefit plans that provide health care benefits to retirees in the coal industry;

(2) to allow for sufficient operating assets for such plans; and

(3) to provide for the continuation of a privately financed self-sufficient program for the delivery of health care benefits to the beneficiaries of such plans.

STATEMENT OF THE CASE

A. Introduction

This case concerns the interpretation of Section 9701(c)(2)(A) of the Coal Industry Retiree Health Benefit Act of 1992 ("Coal Act"), 26 U.S.C. §§9701(c)(2)(A), which defines the term "related persons."[3] Section 9701(c)(2)(A) expressly identifies three types of related persons. The first two concern those who share common ownership with the signatory operator, and the third concerns those who are partners of, or in a joint venture with a signatory operator. In addition, Section 9702(c)(2)(A) provides that "related

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[3] In general, "related persons" are jointly and severally liable with signatory operators for the operators' obligations under the Coal Act.

persons" also include "a successor in interest of any person described in clause (i), (ii), or (iii)."

Despite the literal language of Section 9701(c)(2)(A), which does not extend "related person" status to the successors in interest of signatory operators, the Commissioner of Social Security ("Commissioner") construed the statute in that fashion. As a result, the Commissioner routinely assigns financial responsibility for beneficiaries in the United Mine Workers of America Combined Benefit Fund ("Combined Fund") to the successors in interest of signatory operators who are no longer in business. This case challenges the validity of the Commissioner's construction of Section 9701(c)(2)(A).

B. The Coal Act and its Background

For over forty years prior to the Coal Act's enactment, retirees who had worked at coal mining operations represented by the United Mine Workers of America received health benefits from plans established and funded in accordance with collective bargaining agreements known as National Bituminous Coal Wage Agreements ("Coal Wage Agreements"). The Coal Act was enacted in the face of perceived shortfalls in those plans.[4]

Pursuant to the Coal Act, the Combined Fund became responsible for providing health and death benefits to UMWA retirees previously covered by those collectively bargained plans. *See* Sections 9702 and 9703. To pay for these benefits, the Coal Act directed the Commissioner to assign miners in the Combined Fund to the signatory operators who

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[4] *See Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998).

employed them, and if such operators were no longer "in business," as that term is defined in Section 9701(c)(7), to assign them to the operators' "related persons." *See* Section 9706(a). Each person assigned a miner must pay annual premiums to the Combined Fund for that miner and his or her dependents. *See* Section 9704(a).

C. Disputed Assignments

Michael M. Boich owned and operated a coal mine as a proprietor under the fictitious name of Boich Mining Company. Mr. Boich personally signed various Coal Wage Agreements covering the miners he employed ("Michael Boich Miners").

In 1984, Mr. Boich sold the assets of his mine to a new corporation, also known as Boich Mining Company. In 1986, an affiliate of petitioner Aloe Energy Corporation ("Aloe Energy") purchased the stock of Boich Mining Company. Later, Boich Mining Company was merged into Aloe Energy.

The Commissioner assigned 11 retired Michael Boich Miners (and their dependents) to Boich Mining Company (the corporation) under Section 9706(a) of the Coal Act. SSA reasoned that the signatory operator who had employed them and should receive the assignments - Michael M. Boich - was no longer "in business" and, therefore, they could be assigned to his successor, Boich Mining Company (the corporation).[5] Boich Mining Company unsuccessfully sought administrative review of these assignments.

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[5] None of these miners ever worked for the corporation.

D. The Proceedings Below

Aloe Energy commenced this case to seek review of the Commissioner's final decisions regarding the assignment of the Michael Boich Miners. The District Court had subject matter jurisdiction pursuant to Section 9721 of the Coal Act, as well as 5 U.S.C. §702 and 28 U.S.C. §1331.

On July 27, 1999, the District Court adopted a Magistrate Judge's Report and Recommendation and granted summary judgment in favor of the Commissioner.[6] App. D at 30a. On October 12, 1999, the District Court adopted the Magistrate Judge's Report and Recommendation and denied Aloe Energy's motion to alter or amend the judgment. App. B at 16a. In an unreported decision, the Court of Appeals affirmed. App. A at 1a. In each instance, the court relied on the decision in *R.G. Johnson Company, Inc.*, 172 F.3d 890 (D.C. Cir. 1999), where the court held that, although the plain language of Section 9701(c)(2)(A) did not make a signatory operator's successor in interest a "related person," it was not bound by the literal language of the statute:

> We are faced, then, with one of those "rare cases in which the literal application of the statute will produce a result demonstrably at odds with the intentions of the drafters." *United States v. Ron Pair Enters.*, 489 U.S. 235, 242, 109 S. Ct. 1026, 103 L. Ed. 2d 290 (1989) (internal quotation marks and brackets

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[6] Aloe Energy raised two issues – whether Michael M. Boich was still "in business," and whether the Commissioner could assign miners to a successor. The court ruled in the Commissioner's favor on both issues.

> omitted). In such a circumstance, "the intentions of the drafters rather than the strict language controls." *Id.* Accordingly, in order to "give effect" to Congress's intent in this case, *Chevron*, 467 U.S. at 843, 104 S. Ct. 2778, we hold that Section 9701(c)(2)(A) must be construed to permit the assignment of a Fund beneficiary to the successor in interest of a signatory operator.

Id. at 895; App. at 6-7.[7]

In contrast, on August 29, 2000, the Court of Appeals for the Fourth Circuit, facing the same issue, declined to follow *R.G. Johnson*. Instead, the court ruled that it was bound by the literal language of Section 9701(c)(2)(A):

> What we are being asked to do is improve the statute – to amend it, really. The Commissioner's reading of the statute may be appealing in terms of its logic, but we cannot adopt it as our own without trespassing on a function reserved for the legislative branch. . . . Because our job is to determine the meaning of the statute passed by Congress, and not whether wisdom or logic suggests that Congress could have done better, we conclude that section 9701(c)(2)(A) does not affix

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[7] The Court of Appeals also stated, in dicta, that the "same entity" or "alter-ego" theory it approved in *Lindsey Coal Mining Company v. Chater*, 90 F.3d 688 (3d Cir. 1996), could have applied to this case; however, the court declined to rule on that issue because it was not raised below.

"related person" liability upon a successor in interest to a signatory operator.

Sigmon Coal Company, Incorporated v. Apfel, 226 F. 3d 291, 308 (4th Cir. 2000), *petition for rehearing and suggestion for rehearing en banc pending*.

The Court of Appeals for the First Circuit also previously addressed a related issue – whether Section 9706(a) permits the Commissioner to assign miners to a signatory operator's successor - and held that it did not: "reviewing the language and architecture of the Coal Act as a whole ... we think it is obvious that Congress purposefully omitted any reference to successors in writing section 9706(a)'s assignment scheme." *Eastern Enterprises v. Chater*, 110 F.3d 150, 155 (1st Cir. 1997), *rev'd sub nom. on other grounds, Eastern Enterprises v. Apfel*, 118 S. Ct. 2131 (1998).[8]

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[8] Although the First Circuit did not directly interpret Section 9701(c)(2)(A), its analysis of Section 9706(a) necessarily encompassed Section 9701(c)(2)(A), given that Section 9706(a) permits the Commissioner to assign miners to signatory operators and their related persons. Therefore, by ruling that Section 9706(a) did not permit the Commissioner to assign miners to a signatory operator's successors, the court necessarily ruled that a signatory operator's successor in interest is not a related person.

REASONS FOR GRANTING THE WRIT

I.

The Decision Below, And The Decision By The Court Of Appeals For The District Of Columbia On Which It Was Based, Conflict With Decisions On The Same Issue By The Courts Of Appeals For The First And Fourth Circuits, And Review By This Court Is Needed For The Fair And Effective Administration Of The Coal Industry Retiree Health Benefit Act Of 1992.

The question of whether "related persons" include the successors in interest of signatory operators is important to the fair and effective administration of the Coal Act. Permitting the Commissioner to assign liability to the successors in interest of signatory operators in the Third and the District of Columbia Circuits, but not the First and the Fourth Circuits, upsets the uniform system Congress envisioned, and in one way or another, shifts significant liability to the wrong persons.

Moreover, this is an issue of national importance. The Commissioner has assigned hundreds if not thousands of miners to the successors in interest of numerous signatory operators. Therefore, a decision on this issue will have broad application to those affected by the Coal Act.

Finally, the Coal Act's burdens, even after having been limited by this Court's decision in *Eastern Enterprises v. Apfel*, 118 S. Ct. 2131 (1998), remains unprecedented. The decision in this case and the decision in *R.G. Johnson* unreasonably extend the Coal Act's burden even further, and do so based on a rule of construction reserved for rare and exceptional cases. The highly unusual means by which this

significant liability was extended warrants consideration by this Court.

II.

The Decision Below, And The Decision By The Court Of Appeals For The District Of Columbia On Which It Is Based, Decided An Important Federal Question In A Manner That Conflicts With This Court's Decisions Concerning The Extremely Rare Circumstances In Which The Literal Language Of A Statute Can Be Ignored On The Basis That It Compels A Result Demonstrably At Odds With Congress's Intent.

This case involves an important issue of statutory construction. Only in the rarest of circumstances may a court ignore the literal language of a statute on the basis that such language would produce a result demonstrably at odds with the intentions of the drafters. This is not one of them.

In *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989), this Court, quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982), observed that "[t]he plain meaning of legislation should be conclusive except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.'" In *Griffin*, this Court explained that "interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available." 458 U.S. at 575.

The Court of Appeals for the Third Circuit, following the lead of the Court of Appeals for the District of Columbia, used this "rare" exception to create a new category of related

persons - the successors in interest of signatory operators. Moreover, the courts derived their notion of congressional intent not from legislative history, which they characterized as "inconclusive," 173 F.3d at 894, but from the statute's introductory declaration of policy, which stated simply that Congress found it necessary "to identify persons most responsible for plan liabilities in order to stabilize plan funding and allow for the provision of health care benefits to such retirees." 173 F.3d at 895, *citing* Pub. L. No. 102-486, §19142(a)(2), 106 Stat. 3037.

This is hardly an appropriate case for applying the "rare" exception discussed in *Ron Pair* and *Griffin*. First, the assumption underlying the *R.G. Johnson* decision and the decision in this case - that Congress could not have meant what it said – is contradicted by several rules of construction which, when applied to the Coal Act as a whole, show that Congress meant exactly what it said in Section 9701(c)(2)(A).

Second, the *Ron Pair/Griffin* rules do not apply where, as here, the proposed alternative interpretation violates well-settled rules of construction.

Third, the congressional policy statement is far too thin a reed upon which a court can conclude that Congress meant something other than what it said.

Finally, given the compromises attendant to the passage of the Coal Act, it is plausible, if not likely, that Congress intentionally limited the reach of related person liability to only certain successors in interest.

A. The Rules of Construction Support A Plain Meaning Interpretation of Section 9701(c)(2)(A)

1. Plain Meaning

"The starting point in interpreting a statute is its language, for '[i]f the intent of Congress is clear, that is the end of the matter.'" *Good Samaritan Hospital v. Shalala*, 508 U.S. 402, 409 (1993). Thus, courts must begin with the presumption that Congress "says in a statute what it means and means in a statute what it says there." *Connecticut National Bank v. Germain*, 503 U.S. 249, 254 (1992).

Here, both the *R.G. Johnson* Court and the court in this case found that Section 9701(c)(2)(A) was unambiguous and plainly did not make the successors in interest of signatory operators "related persons." Significantly, however, both courts ignored other rules of construction that also supported a plain meaning interpretation of this language.

2. Intentional Exclusion

"Where Congress includes particular language in one section, but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in its disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983). Here, Congress addressed the rights and obligations of "successors" in several locations in addition to Section 9701(c)(2)(A), including Subchapter B, which concerns the Combined Fund, and Subchapter C, which concerns Individual Employer Plans ("IEPs") and the United Mine Workers of America 1992 Benefit Plan ("1992 Plan").

The "successor" provision concerning the Combined Fund - Section 9706(b)(2) - states that "if a person becomes a successor of an assigned operator after the enactment date, the assigned operator may transfer the assignment of an eligible beneficiary ... to such successor ... [but] the assigned operator transferring such assignment ... shall remain the guarantor of the benefits ...." Of the two "successor" provisions involving IEPs and the 1992 Plan, one – Section 9711(g)(2) - is nearly identical to Section 9706(b)(2). The other – Section 9711(g)(1) - provides that, for purposes of Subchapter C, "[t]he term 'last signatory operator' shall include a successor in interest of such operator."

By expressly addressing successorship in Sections 9701(c)(2)(A), 9706(b)(2), and 9711(g)(1) and (2), there can be no doubt that Congress was aware of the concept. Therefore, Congress's use of language imposing "related person" liability on only certain persons, not including the successors in interest of signatory operators, coupled with its imposition of Subchapter C liability on the successors in interest of signatory operators, and its creation of a means by which post-enactment successors voluntarily can assume liability under Subchapters B and C, must be viewed as intentional under *Russello*, 464 U.S. at 23. *See also Hohn v. United States*, 524 U.S. 236, 250 (1998)("[A] Congress concerned enough to bar our jurisdiction in one instance would have been just as explicit in denying it in the other, were that its intention.").

3. Giving Effect to All Terms

This Court's decisions "consistently have expressed 'deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment.'" *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868,

877 (1991). Indeed, it is a "'cardinal principle of statutory construction' ... [that] [i]t is our duty 'to give effect, if possible, to every clause and word of a statute' ... rather than emasculate an entire section." *Bennett v. Spear*, 520 U.S. 154, 173 (1997). Here, construing Section 9701(c)(2)(A) as making the successors in interest of signatory operators related persons does just that.

As mentioned above, Section 9711(g)(1) states that, for purposes of Subchapter C, "[t]he term 'last signatory operator' shall include a successor in interest of such operator." If the successor in interest of a signatory operator already were a "related person," however, then Section 9711(g)(1) would be surplusage. This is because Sections 9711(c) and 9712(d)(4) separately extend a signatory operator's Subchapter C obligations to its "related persons."[9]

Alternatively, if the term "related person" does not include a signatory operator's successor in interest, then Section 9711(g)(1) makes sense as a limited form of liability for a signatory operator's successor in interest.

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[9] Section 9711(c) provides that "[e]ach related person of a signatory to which subsection (a) or (b) [relating to IEP obligations] applies shall be jointly and severally liable with the last signatory operator for the provision of health care coverage described in subsection (a) or (b)." Section 9712(d)(4) provides that "[a] 1988 last signatory operator or last signatory operator described in paragraph (3), and any related person to any such operator, shall be jointly and severally liable with such operator for any amount required to be paid under this Section."

4. Not Inferring Additional Remedies

"A frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies." *Northwest Airlines, Inc. v. Transport Workers Union of America*, 451 U.S. 77, 94, n. 30 (1981). Here, the Coal Act explicitly sets forth a detailed remedial scheme for imposing liability on signatory operators and other persons. In particular, Section 9701(c)(2)(A) extends liability to carefully defined "related persons," and Section 9711(g)(2) extends liability to a last signatory operator's successor in interest. Under these circumstances, expanding Section 9701(c)(2)(A) to include the successors in interest of signatory operators is unwarranted, and amounts to an impermissible rewriting of the statute. *Burlington Northern Railroad Co. v. Oklahoma Tax Commission*, 481 U.S. 454, 463 (1987) ("Respondent's position depends upon the addition of words to a statutory provision which is complete on its face. Adoption of their view would require amendment rather than construction of the statute, and it must be rejected here.").

In sum, the language used, as well as several well-settled rules of statutory construction, show that Congress meant exactly what it said in Section 9701(c)(2)(A).

B. The *Ron Pair/Griffin* Exception Does Not Apply Where the Proposed Alternative Interpretation Violates Other Rules of Construction

A court can avoid absurd interpretations "if alternative interpretations consistent with the legislative purpose are available." *Griffin*, 458 U.S. at 575. Here, the alternative interpretation adopted by the court below and by the *R.G.*

Johnson Court plainly violates several rules of construction. Indeed, neither court offered any means of harmonizing its construction with these rules. Therefore, the *Ron Pair/ Griffin* exception cannot apply.

C. The General Congressional Policy Statement Does Not Provide a Sufficient Basis for Rejecting the Plain Meaning of the Statute

A court must be wary of a construing a statute based on its purpose:

> Application of "broad purposes" of legislation at the expense of specific provisions ignores the complexity of the problems Congress is called upon to address and the dynamics of legislative action. Congress may be unanimous in its intent to stamp out some vague social or economic evil; however, because its members may differ sharply on the means for effectuating that intent, the final language of the legislation may reflect hard-fought compromises. Invocation of the "plain purpose" of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of Congressional intent.

Board of Governors of the Federal Reserve System v. Dimensions Financial Corporation., 474 U.S. 361, 373-74 (1986). For this reason, "it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 526 (1987).

Under these circumstances, the general policy statement cited by the court below and by the *R.G. Johnson* Court falls well short of demonstrating a clear congressional intent that can overcome the plain meaning of the language Congress used. *See also Sigmon*, 226 F.3d at 305 ("[T]he general policy statement does not impress us as the kind of pellucid expression of legislative intent that would displace a specific textual provision that is clear and unambiguous.").

D. The Omission of Successors in Interest of Signatory Operators from Section 9701(c)(2)(A) is not Absurd

This Court rarely ignores the literal language of a statute on the basis of absurdity. Where it has done so, there was no other basis for determining Congress's intent and there was no possible justification for the literal interpretation, circumstances not present here.

In *Green v. Bock Laundry Machine Company*, 490 U.S. 504 (1989), this Court found that Rule 609(a) of the Federal Rules of Evidence, which literally permitted a court to exclude evidence of a prior conviction if it would prejudice a defendant, but admit the evidence against a civil plaintiff regardless of its prejudicial effect, could not have meant what it said. This Court observed that, "no matter how plain the text of the Rule may be, we cannot accept an interpretation that would deny a civil plaintiff the same right to impeach an adversary's testimony that it grants to a civil defendant." *Id.* at 510. Indeed, this Court found it "unfathomable why a civil plaintiff – but not a civil defendant – should be subject to this risk." *Id.*

Likewise, in *Clinton v. City of New York*, 524 U.S. 417, 429 (1998), this Court ruled that the word "individual" in the jurisdictional section of the Line Item Veto Act must be

interpreted to include natural and corporate persons: "[t]here is no plausible reason why Congress would have intended to provide for such special treatment of actions filed by natural persons and to have precluded entirely jurisdiction over comparable cases brought by corporate persons."

In contrast, this Court refused to deviate from the literal language of a statute in *Griffin*, where the statute provided a penalty of two days wages for each day a seamen's wages were withheld without sufficient cause, even though the penalty could (as it did there) end up exceeding the wages due by over 7000%. This Court observed that the legislative history showed Congress intended the statute to apply in that fashion, and therefore concluded that:

> It is enough that Congress intended that the language it enacted would be applied as we have applied it. The remedy for any dissatisfaction with the results in particular cases lies with Congress and not with this Court. Congress may amend the statute; we may not.

458 U.S. at 576.

In *Hallstrom v. Tillamook County*, 493 U.S. 20 (1989), this Court refused to deviate from the language of a statute which required citizens to notify the appropriate state agency of an alleged violation of an environmental law at least 60 days before filing suit. This Court initially recognized that the legislative history demonstrated a congressional intent to strike a balance between encouraging citizen suits and not overburdening the federal courts. Thus, this Court refused to deviate from the plain language because any potential environmental harm occasioned by the delay "arises as a

result of the balance struck by Congress in developing the citizen suit provisions." 493 U.S. at 30.

The foregoing cases demonstrate that to ignore the plain language of a statute under the *Ron Pair/Griffin* rationale, there must not be any other means of ascertaining Congress's intent, and the result must be "unfathomable." *See Green*, 490 U.S. at 510. Neither of these circumstances exist here.

As discussed above, several rules of construction show that Congress meant exactly what it said in Section 9701(c)(2)(A), *i.e.*, that it did not inadvertently omit successors in interest of signatory operators.

Moreover, the limited extension of successor liability found in Section 9701(c)(2)(A) is nothing more than a classic example of legislative compromise. In *Sigmon*, the court recognized that a major complaint leading to the Coal Act's passage was that operators were being required to pay for benefits for retired miners who never worked for them. 226 F. 3d at 307, *citing* 138 *Cong. Rec.* S17566-01, S17607. *See also The Secretary of Labor's Advisory Commission on United Mine Workers of America Retiree Health Benefits. Coal Commission Report. A Report to the Secretary of Labor and the American People*. Washington, D.C., November 1990, at page 60 ("Because of the lack of consensus on the question of who should pay for orphans, the Commission has reviewed an industry-wide funding proposal and an alternative proposal.").

Moreover, Senator Warner made the following observations when the Coal Act compromise bill was passed:

> A period of arduous negotiations commenced. A comprehensive plan emerged, mandating contributions by not only present but former BCOA members as well. In general, dating back to 1950, the former employer of the longest duration will be assigned the health costs of the retiree. For the many thousand retirees whose former employers have ceased to exist, these orphans will be assigned to present and former BCOA members on a prorated basis.

138 Cong. Rec. S17566-01, S17636.

Finally, Senator Glenn noted that "the Coal Industry Retiree Health Benefits package before us today has been among the most contentious matters facing legislators this year." 138 *Cong. Rec.* S18250-02, S18250.

Under these circumstances, extending successor liability to some persons in one context (related persons' successors in interest in Section 9701(c)(2)(A)), and other persons in a different context (last signatory operators' successors in interest in Section 9711(g)(2)), and leaving the decision up to the parties in still other contexts (post-enactment transactions in Sections 9706(b)(1) and 9711(g)(2)), is hardly absurd. Indeed, it easily can be explained as a series of compromises Congress struck on a difficult issue.

Finally, leaving Section 9701(c)(2)(A) as written does not undermine the Coal Act's effectiveness in any way. As written, Section 9701(c)(2)(A) broadly extends liability to a large group of entities. The fact that it does not expand the liability to include still another group - the successors in interest of signatory operators - will not reduce the

effectiveness of the provision as written, nor will it deprive any miners of any benefits.

Miners whose employers and their related persons are out of business simply will be placed in the unassigned beneficiaries pool, and their benefits will be paid in accordance with Section 9704(a)(3). This hardly can be considered an unexpected result, as Congress explicitly provided for it, much less an absurd one.

CONCLUSION

The split in the Circuits regarding the proper interpretation of Section 9701(c)(2)(A) creates an issue of national concern regarding the fair and effective administration of the Coal Act. In addition, the decisions by the Third and the District of Columbia Circuits to ignore the literal language of the statute's text, on the basis that Congress could not have meant what it said, in the face of several rules of construction showing that Congress meant exactly what it said, conflicts with and unduly extends the extremely narrow reach of the *Ron Pair/Griffin* cases. This is particularly troublesome given that Congress's so-called intent is derived solely from a short introductory statement to the Coal Act which makes no mention of related persons or successors in interest.

As the Fourth Circuit recognized in *Sigmon*, the Third and the District of Columbia Circuits effectively usurped Congress's powers by rewriting the statute to judicially create an entirely new category of "related persons" - successors in interest of a signatory operator. 226 F.3d at 308.

For all of the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

David J. Laurent
Matthew H. Smith
BABST, CALLAND, CLEMENTS
and ZOMNIR, P.C.
Two Gateway Center
Eighth Floor
Pittsburgh, PA 15222
(412) 394-6440

Counsel for Petitioner

APPENDIX A

UNREPORTED - NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

[Filed June 20, 2000]

No. 99-3915

ALOE ENERGY CORPORATION,)
a Pennsylvania Corporation,)
Appellant)
)
v.)
)
KENNETH APFEL,)
Commissioner of Social Security)
)

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civil No. 98-cv-01371)
District Judge: Honorable Donald E. Ziegler)

Submitted Under Third Circuit LAR 34.1(a)
May 26, 2000

Before: ALITO and RENDELL, Circuit Judges, and DUHÉ, Senior Circuit Judge*

MEMORANDUM OPINION

RENDELL, Circuit Judge.

I. BACKGROUND

Aloe Energy Corporation appeals from an order and judgment of the United States District Court for the Western District of Pennsylvania, which adopted the Magistrate Judge's Report and Recommendation ("R & R") granting summary judgment in favor of the Commissioner of the Social Security Administration ("Commissioner"). The District Court subsequently denied Aloe's motion to alter or amend that judgment. Aloe contends that the Commissioner wrongfully assigned it responsibility for eligible miners under the Coal Industry Retiree Health Benefit Act of 1992 ("Coal Act" or "Act"). 26 U.S.C. §§ 9701-9722. Specifically, Aloe raises two points of error. First, Aloe argues that the Commissioner improperly assigned the miners to Aloe as a successor to a signatory operator because the plain language of the statute does not expressly categorize successors as a "related person" for purposes of § 9701(c)(2)(A). Second, Aloe contests the Commissioner's finding that Mr. Boich was no longer "in business" within the meaning of § 9701(c)(7) because he continued to derive revenue from a business

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* The Honorable John M. Duhé, Jr., United States Court of Appeals Judge for the Fifth Circuit, sitting by designation.

activity through coal brokerage fees, coal royalties, and real estate rental revenues.

The District Court had jurisdiction over this case under 28 U.S.C. § 1331 and we have jurisdiction over this appeal under 28 U.S.C. § 1291. The applicable standard of review over these issues is whether the Commissioner's actions were arbitrary, capricious, an abuse of discretion, or not in accordance with law. See 5 U.S.C. § 706(2)(A); *Lindsey v. Coal Mining Co. v. Chater*, 90 F.3d 688, 691 (3rd Cir. 1996). We will affirm the District Court's order upholding the Commissioner's actions.

Michael M. Boich was sole proprietor of a coal mining business that he owned and operated until 1984 when he incorporated under the name of Boich Mining Company ("BMC."). As sole proprietor, Mr. Boich had personally signed various coal wage agreements covering the miners he employed and securing their future benefits. Under the terms of the incorporation transaction, however, the newly-formed corporation would "assume and fulfill all employment agreements, labor contracts, sales agreements, lease obligations, and like contracts, agreements, and commitments" of the business. R & R, p. 7.[1] In addition, Br. Boich turned over all of the business' assets and liabilities to the corporation in exchange for all corporate shares. In 1986, an affiliate of Aloe purchased all of BMC's shares and in 1996, BMC merged into Aloe.

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[1] Because we do not have the administrative record, we will refer to the R & R for information contained therein.

After relinquishing his sole proprietorship in 1984, Mr. Boich stopped filing SSA wage reports as a signatory operator with an employer identification number. Following the incorporation of BMC, Mr. Boich continued to earn some income from independent coal brokerage activity, real estate rentals, and coal royalties. His brokerage income was reported on Schedule C of his income tax returns until 1996 when he no longer received such fees. From 1983 to 1997 Mr. Boich received rental revenue from four different properties, none of which appear to have been owned, leased, used, or in any way related to either Mr. Boich's sole proprietorship or BMC.[2]

Between 1993 and 1997, the Commissioner, acting pursuant to the Coal Act, assigned several retired miners formerly employed by Mr. Boich to BMC.[3] These assignments were based on the Commissioner's determination that the original signatory operator who had employed these minors, Mr. Boich as sole proprietor, was no longer in business and BMC, the subsequent corporation, was the successor to this proprietorship and, thus, a related company. Aloe inherited these obligations when BMC merged into it. After unsuccessfully challenging these determinations with the

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[2] In fact, a letter from Mr. Boich's lawyer explicitly states this to be the case and further indicates that all but one of these properties was jointly held by Mr. Boich and his wife. Aloe does not argue to the contrary. See Joint Appendix, vol. II, p. 265.

[3] Prior to BMC's merger into Aloe in 1996, the contested assignments were made to BMC. Aloe has raised no challenge to its own liability as distinct from BMC's liability. See Brief for Appellee, p. 10.

Social Security Administration, Aloe filed a complaint in the district court.

The Magistrate Judge concluded that the Commissioner acted reasonably when he assigned the miners to BMC based upon the complete transfer of assets during the incorporation transaction and the corporation's contractual assumption of future employment obligations. Furthermore, the Magistrate Judge reasoned that Mr. Boich was no longer "in business" for purposes of the Coal Act because his business activity was sporadic, rather than regular and continuous, and because he received revenue from passive, rather than active, business investments. The District Court agreed, adopted the magistrate's recommendations, and denied Aloe's motion to amend the judgment.

II. DISCUSSION

Aloe contends that the Commissioner wrongly assigned miners who had worked for Mr. Boich, the sole proprietor, to BMC, the corporation, under the Coal Act. The Coal Act of 1992 was enacted to ensure that coal mine retirees and their dependents would continue to receive health and death benefits through stable funding and self-sufficient benefit plans. See R & R, p. 2 (quoting *Anker Energy Corp. v. Consolidation Coal Co.*, 177 F.3d 161, 164 (3rd Cir. 1999)). Under the Act, the Commissioner is required to "assign each coal industry retiree who is an eligible beneficiary to a signatory operator which (or any related person with respect to which) remains in business." 26

U.S.C. § 9706(a).[4] A signatory operator is defined as "a person which is or was a signatory to a coal wage agreement." 26 U.S.C. § 9701(c)(1). If a signatory operator is no longer in business, the miner is assigned to a "related person" of the signatory operator. See Brief for Appellant, p. 6 (stating that this is SSA procedure even though it is not articulated in SSA decisions); 26 U.S.C. § 9706(a). The Act defines "related person" as follows:

---

[4] These assignments are made in the following order:

> (1) First, to the signatory operator which--
>
> (A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and
>
> (B) was the most recent signatory operator to employ the coal industry retiree in the coal industry for at least two years.
>
> (2) Second, if the retiree is not assigned under paragraph (1), to the signatory operator which--
>
> (A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and
>
> (B) was the most recent signatory operator to employ the coal industry retiree in the coal industry
>
> (3) Third, if the retiree is not assigned under paragraph (1) or (2), to the signatory operator which employed the coal industry retiree in the coal industry for a longer period of time than any other signatory operator prior to the effective date of the 1978 coal wage agreement.

> (A) In general [a] person shall be considered to be related to a signatory operator if that person is--
>
> (i) a member of the controlled group of corporations which includes the signatory operator;
>
> (ii) a trade or business which is under common control with such signatory operator; or
>
> (iii) any other person who is identified as having a partnership interest or joint venture with a signatory operator in a business within the coal industry, but only if such business employed eligible beneficiaries, except that this clause shall not apply to a person whose only interest is as a limited partner.
>
> A related person shall also include a successor in interest of any person described in clause (i), (ii), or (iii). 26 U.S.C. § 9701(c)(2)(A).

First, Aloe contends that because BMC was a successor to a signatory operator and successors are not specifically listed as "related persons" under § 9706(a), the plain language of § 9706(a) demonstrates Congress' intent to exclude successors from liability. Furthermore, Aloe points to Congress' inclusion of successors in other provisions as an indication of purposeful exclusion.

However, we think that the District Court correctly determined that the Commissioner's decision to assign the miners to BMC under a successorship theory was neither arbitrary nor capricious based upon *R.G. Johnson Company, Inc. v. Apfel*, 172 F.3d 890 (D.C. Cir. 1999). *Johnson* addressed the question of whether or not a signatory

operator's technical change in form could immunize it from liability for retired miners. The *Johnson* court recognized that it was facing one of those "rare cases in which the literal application of a statute will produce a result demonstrably at odds with the intentions of the drafters." Id. at 895 (quoting *United States v. Ron Pair Enter.*, 489 U.S. 235, 242 (1989)). Accordingly, the Court held that § 9706 (c)(2)(A) must be construed to permit the assignment of eligible beneficiaries to the successor of a signatory operator or else Congress' aim to create stable and self-sufficient retirement plans by identifying the parties most responsible would be eviscerated. *See Id.* In light of this decision, we agree with the District Court that the Commissioner's assignment to BMC as the successor to Mr. Boich's sole proprietorship, the signatory operator, was neither arbitrary nor capricious.[5]

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[5] In addition, we recognize that the "same entity" or "alter ego" theory approved by this court in *Lindsey Coal Mining Co. v. Chater* is applicable in this case. See 90 F.3d 688 (3rd Cir. 1996). In *Lindsey*, we found that a liquidating trust was essentially the "same person' as its previous corporate form because the corporate shareholders became the beneficiaries of the trust, the trust had existed for over twenty years, and during that time, the trust engaged in the same activities as the corporation engaged in prior to changing form. *Id.* at 691-92. Similar to the change in *Lindsey*, the only real difference between Mr. Boich's sole proprietorship and BMC as a corporation was a technical change of form. Thus, under *Lindsey*, we would not need to address the successorship issue because BMC would automatically adopt the employment obligations of Mr. Boich's sole proprietorship, as they were really the same entity. However, because this theory was raised on appeal, we agree with the District Court that the Commissioner properly assigned the eligible beneficiaries to BMC under the successorship theory.

Second, Aloe argues that the Commissioner wrongly assigned the miners because the signatory operator, Mr. Boich, remained "in business" for purposes of the Coal Act and, therefore, as signatory operator, he is the proper assignee. Aloe relies upon the revenue that Mr. Boich derived primarily from brokerage fees and real estate revenues, in addition to his use of Schedule C to report his brokerage income, as evidence of his "in business" status. The Act states that "a person shall be considered to be in business if such a person conducts or derives revenue from any business activity, whether or not in the coal." 26 U.S.C. § 9701(c)(7). In *Lindsey Coal Mining Co. v. Chater*, we interpreted "in business" somewhat broadly:

> Because the "conducts prong is provided for separately, the "derives revenue" does not require the party liable under the Coal Act to itself "conduct" a business activity. Otherwise, the "derives revenue" option would be surplusage, which cannot have been Congress' intent. By the statute's own terms, then, someone other than the "signatory operator" may be the one engaging in the business activity. *Lindsey*, 90 F.3d 688, 692 (3rd Cir. 1996).

Aloe relies on *Lindsey* for the proposition that Mr. Boich is "in business" under the Act because he continued to derive revenue from business activity, both related and unrelated to MBC, even after selling the assets of his sole proprietorship. However, we do not conclude that even a liberal construction necessarily requires that Mr. Boich's activity renders him "in business" under the Act.

In *Lindsey*, we held that a liquidating trust was "in business" for Coal Act purposes because it basically conducted the exact same activities that it had conducted for twenty-two years in its previous corporate form. *See Id.* at 691-92. Furthermore, the liquidating trust continued to derive substantial revenue from its quasi-corporate conduct. However, Mr. Boich's status is distinguishable from the "in business" status of the liquidating trust because (1) his post-incorporation revenue-generating activities were vastly different from those he carried on when a sole proprietor and (2) his status as a sole proprietor can be viewed somewhat differently than that of a corporate entity.

First, Mr. Boich's business activities pre and post-incorporation were not the same, or even similar. The record shows that Mr. Boich engaged in coal brokering activity from 1985-1996. Boich engaged in coal brokering activity from 1985-1996. See R & R, p11. This activity took place after he incorporated his sole proprietorship to form BMC in 1984. Unlike the liquidating trust in *Lindsey*, Mr. Boich did not simply carry on the same activities both before and after the change in corporate form, but rather he sporadically engaged in an activity that was altogether new and personal to him. And, even though Mr. Boich may have declared his brokerage income using Schedule C, "the mere filing of a Schedule C tax form in certain years does not conclusively show that an individual's business activity has been continuous and regular." District Court order, Joint Appendix, vol. I, p. 11 (denying motion to amend judgment). In addition, although Mr. Boich earned revenue from real estate rentals both before and after incorporating, there is no indication that any of these properties was ever owned, leased, or used, or in any way related to either the sole

proprietorship or the corporation. In contrast, the *Lindsey* trust derived its rental income directly from corporate property, not from the personal property of its corporate members. Thus, to properly analogize Aloe's situation to the situation in *Lindsey*, it is really BMC that carried on in the same manner as the sole proprietorship, not Mr. Boich, the individual who was the sole proprietor himself.

Second, Mr. Boich's status as a sole proprietor prior to incorporating BMC deserves different consideration from Lindsey's status as a corporation prior to liquidating. To allow a corporation to escape Coal Act responsibility where the original signatory operator was a sole proprietor would be unfair, unwarranted, and contrary to Congress' intent. See Brief for Appellee, p. 26. The Coal Act was passed to provide stable funding, sufficient operating assets, and self-sufficient benefit plans for retired miners. Yet, to assign beneficiaries to individuals who, thereafter, still need to make a living from various sources of income would undermine such goals. In addition, the Commissioner's Supplemental Coal Act Review Instruction #4, which helps govern the assignment of beneficiaries, specifies that when a "sole proprietor incorporates a business, but continues to control its operations," the incorporated business is to be treated the same as its predecessor for assignment purposes under the Act. See Addendum to brief for appellee, vii-viii. These instructions are pertinent to Mr. Boich's plight as he was a sole proprietor who incorporated his assets, and continued to control the corporate operations, so that the assignment to the resultant corporation is warranted.

The Commissioner based his determination on several factors, including his own interpretation of "business

activity," which is not defined in the Act. In an effort to define this term, the Commissioner looked to a variety of criteria for guidance. First, he utilized Supplemental Coal Act Review Instructions and Internal Revenue Code provisions, which focused on the need for continuous and regular activity, to determine that Mr. Boich's sporadic brokerage fee activity was insufficient to constitute "business activity." See R & R, pp. 13-14. Second, the Commissioner stated that Mr. Boich's income, especially his real estate rental income, qualified as passive, and not active income, which, according to the Coal Act's operating instructions, usually does not constitute business activity.[6] Third, the Commissioner relied upon SSA electronic wage report records which showed that Mr. Boich stopped filing these reports in 1984, an indication that he was no longer engaged in business activity. See R & R, p. 14. Additionally, the Commissioner considered the good-faith transfer of all of Mr. Boich's assets to BMC in which the corporation agreed to assume all of Mr. Boich's future employment obligations. The combination of these factors led the Commissioner to identify BMC, and not Mr. Boich, as the responsible party. Based upon this record, we agree with the District Court that the Commissioner's interpretation of the undefined term "business activity," the subsequent application of this definition to Mr. Boich's conduct, and the conclusion that such conduct did not constitute business activity under the Act were reasonable and not arbitrary.

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[6] Passive investments, such as interest earned on a corporate account, dividends received from stock investments, passive rental income, income from leases, etc., usually do not constitute a business activity. See R & R, p. 14 (quoting Supplemental Coal Act Review Instructions #3, section N, p. 27).

III. CONCLUSION

In conclusion, we agree with the District Court that the Commissioner's assignment of miners to BMC under the Coal Act of 1992 was not arbitrary, capricious, an abuse of discretion, or not in accordance with the law. For the foregoing reasons, we will affirm.

TO THE CLERK OF COURT:

Please file the foregoing Memorandum Opinion.

/s/_____
Circuit Judge

Dated: Jun 20 2000

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

[Filed June 20, 2000]

No. 99-3915

ALOE ENERGY CORPORATION,)
a Pennsylvania Corporation,)
Appellant)
)
v.)
)
KENNETH APFEL,)
Commissioner of Social Security)
)

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civil No. 98-cv-01371)
District Judge: Honorable Donald E. Ziegler)

Submitted Under Third Circuit LAR 34.1(a)
May 26, 2000

Before: ALITO and RENDELL, Circuit Judges, and DUHÉ, Senior Circuit Judge*

* The Honorable John M. Duhé, Jr., United States Court of Appeals Judge for the Fifth Circuit, sitting by designation.

JUDGMENT

This case came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was submitted pursuant to Third Circuit LAR 34.1(a). On consideration whereof, it is now here

ORDERED and ADJUDGED by this court that the order of the District Court entered on October 12, 1999, be and the same is hereby AFFIRMED. Costs taxed against appellant.

ATTEST:

/s/_____
Acting Clerk

Dated: June 20, 2000

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

[Dated October 12, 1999]

No. 98-1371

ALOE ENERGY CORPORATION, a Pennsylvania Corporation, *Plaintiff,*

v.

KENNETH S. APFEL, Commissioner of Social Security, *Defendant.*

ORDER

AND NOW, this 12th day of October, 1999, after the plaintiff, Aloe Energy Corporation, filed a motion to alter or amend the judgment in the above-captioned case, and after a Report and Recommendation was filed by the United States Magistrate Judge, and the parties were granted ten days after being served with a copy to file written objections thereto, and upon consideration of the objections filed by the plaintiff, as well as a response to those objections filed by defendant Kenneth S. Apfel, the Commissioner of Social Security, and upon independent review of the pleadings and the record, and

the Magistrate Judge's Report and Recommendation, which is adopted as the opinion of this Court,

IT IS ORDERED that the plaintiff's motion to alter or amend the judgment in this case (Docket No. 25) is denied.

s/Donald E. Ziegler
United States District Judge

cc: All Counsel of Record

Honorable Robert C. Mitchell
United States Magistrate Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

[Dated September 27,1999]

No. 98-1371

ALOE ENERGY CORPORATION,)
a Pennsylvania Corporation,)
Plaintiff,)
)
v.)
)
KENNETH S. APFEL,)
Commissioner of Social Security,)
Defendant.)
)

REPORT AND RECOMMENDATION

I. Recommendation:

It is respectfully recommended that the plaintiff's motion to alter or amend the judgment in this case (Docket No. 25) be denied.

II. Report:

Presently before the Court is a motion to alter or amend the judgment in this case submitted by the plaintiff, Aloe Energy Corporation ("Aloe Energy").

Aloe Energy commenced this action to challenge certain final decisions issued by the Social Security Administration ("SSA") which upheld the defendant, Commissioner of Social Security's assignment of several retired miners and their dependents from the United Mine Workers of America to Boich Mining Company ("Boich Mining") and to Aloe Coal Company ("Aloe Coal").[1] The defendant's assignment of these miners was made pursuant to the Coal Industry Retiree health Benefit Act of 1992, 26 U.S.C. §§ 9701, et seq. (the "Coal Act"), which requires the Commissioner of Social Security to "assign each coal industry retiree who is an eligible beneficiary to a signatory operator which (or any related person with respect to which) remains in business". 26 U.S.C. § 9706(a).

In this case, and as recounted in the Court's Report and Recommendation dated June 10, 1999, the defendant assigned certain retired miners to Boich Mining on the basis that the signatory operator that actually employed these miners -- a sole proprietorship owned by Michael M. Boich and known as Boich Mining Company -- was no longer in business, and that Boich Mining (the corporation at issue here) should receive the assignments because it was Michael

---

[1] Aloe Energy is the successor by merger to both Boich Mining and Aloe Coal.

M. Boich's successor, and thus a related company to him. Aloe Energy disputed the propriety of these assignments to Boich Mining. It argued that Boich Mining was not a related person to Michael M. Boich, and further, that Michael M. Boich was "in business" as that term is defined in the Coal Act.

The defendant also assigned retired miner Robert E. Jamison to Aloe Coal. The plaintiff asserted that this assignment was 8improper because SSA wrongly refused to provide it with Jamison's earnings records, or to review his assignment on grounds that Aloe Energy did not timely contest Jamison's assignment, when in fact it never received the original notice of his assignment in a timely manner.

The parties filed cross-motions for summary judgment on the issue of whether the assignment of these miners was arbitrary, capricious and an abuse of discretion. On July 27, 1999, the Court issued an Order, adopting our June 10, 1999 Report and Recommendation. In that Order, the Court granted partial summary judgment to the plaintiff on SSA's decision refusing to provide it with Robert E. Jamison's earnings records and/or to review his assignment to Aloe Coal, and it granted partial summary to the defendant on SSA's decisions assigning the retirees at issue to Boich Mining.

On August 5, 1999, Aloe Energy filed its present motion pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, seeking to alter or amend that portion of the Court's July 27, 1999 Order which granted partial summary judgment to the defendant. In its motion, Aloe Energy contends that the Court erred when it concluded that SSA's

determination that Michael M. Boich was not "in business" for purposes of the Coal Act was rational, based on relevant factors and not arbitrary or capricious.

"[A] motion for reconsideration is placed within the sound discretion of the district court". *Hudson United Bank v. Litenda Mortgage Corp.*, 142 F.3d 151, 159-60 (3d Cir. 1998). Our Court of Appeals has stated that "a judgment may be altered or amended if the party seeking reconsideration shows at least one of the following grounds:

> (1) an intervening change in the controlling law;
>
> (2) the availability of new evidence that was not available when the court granted the motion for summary judgment; or
>
> (3) the need to correct a clear error of law or fact or to prevent manifest injustice."

Max's Seafood Café v. Quinteros, 176 F.3d 669, 677 (3d Cir. 1999).

In support of its present motion, Aloe Energy relies upon the third factor listed above. It contends that Michael M. Boich met the "in business" criteria relied upon by SSA in this case, such that it was a clear error for SSA to conclude that Mr. Boich was not "in business" for purposes of the Coal Act.

In our June 10, 1999 Report and Recommendation (hereinafter, the "R & R"), we reviewed the Administrative Record and SSA's rationale for determining that Mr. Boich

was not "in business". As we stated in the R & R at pages 11015:

> from 1985-1996, Michael M. Boich earned coal brokerage fees from various sources which he reported as income on Schedule C of his federal income tax returns. From 1983-1997, Mr. Boich also received rental income from four real estate investments in which he owned an interest which he reported on Schedule E of his federal income tax returns. A summary of Michael M. Boich's income derived from his aforementioned brokerage fees and real estate investments indicates that from 1984 through 1997, he averaged in excess of $500,000 per year.
>
> According to SSA, it determined that Michael M. Boich was not "in business" for purposes of the Coal Act during those time periods, because although Mr. Boich earned substantial passive income from his investments, the record failed to show that he was actively engaged in a business activity within the meaning of the Coal Act. SSA asserts that because the Coal Act is silent on what constitutes "business activity", it looked to the Internal Revenue Code ("IRC") for guidance in implementing the statute. In connection therewith, SSA developed instructions for determining if a company is engaging in a "business activity" based upon the following criteria set forth in the IRC for determining

activity that constitutes a "trade or business" for which expenses may be deducted under 26 U.S.C. § 162:

> (1) The primary purpose for engaging in the activity is to earn a livelihood or profit; and
>
> (2) The activity entails some type of economic activity and has a profit motive; and
>
> (3) The person is involved in the activity with continuity and regularity.

As set forth in SSA's operating instructions: "If the activity meets all of the above criteria, then the company is engaging in a 'business activity'."

It is SSA's position that the brokerage fees earned by Mr. Boich do not satisfy the third criteria, above, as such fees were based on sporadic activity, not activity that he was involved in with continuity and regularity. SSA also avers that Mr. Boich's earnings, especially his rental income on real estate investments, constitutes passive income, and under its operating instructions:

> Passive investment, such as interest earned on a corporate account, dividends received from stock

> investments, passive rental income, income from leases, etc., usually do not constitute a 'business activity'.

In addition, SSA asserts that when ascertaining "business activity", it reviews its electronic system of records to determine if wages were reported under a signatory operator's employer identification number ("EIN"). The record supports SSA's assertion that:

> In Mr. Boich's case, reporting activity on his EIN stopped after 1984. Mr. Boich reported $1,888,466.42 in wages paid in 1983; $1,680,842.23 in 1984 and none in the years 1985, 1986, 1987, 1988 and 1989...In 1990, Mr. Boich paid out wages of $16,150.00; in 1991, $23,050.00; and $23,800.00 in 1992...No wage have been reported in subsequent years.

Based on these wage reports, SSA found that there was no business activity after 1984. This finding, combined with its determination that Mr. Boich's revenue was derived from passive income and entailed only sporadic activity, led SSA to conclude that Mr. Boich was not "in business" for purposes of the Coal Act.

The crux of the plaintiff's argument here centers on the aforementioned IRC criteria which SSA utilized for determining if Michael M. Boich was "in business". The

plaintiff argues it was irrational for SSA to find that Mr. Boich's coal brokering fees were based on sporadic activity, because Mr. Boich reported the income he derived from his coal brokering activities on Schedule C of his federal income tax return. In relevant part, instructions for Schedule C provide: "Schedule C [is to be used] to report income or loss from a business... [and]... [a]n activity qualifies as a business if your primary purpose for engaging in the activity is for income or profit and you are involved in the activity with continuity and regularity."

Aloe Energy made this same argument in support of its motion for summary judgment, as well as in its objections to the R & R. As case law form this circuit makes clear, "[a] motion for reconsideration is not a vehicle to reargue [a] motion". *Bermingham v. Sony Corporation of America*, 820 F.Supp. 834, 856 (D.N.J.), *aff'd.*, 37 F. 3d 1485 (3d Cir. 1994). Thus, "[a] party seeking reconsideration must show more than a disagreement with the Court's decision, and recapitulation of the cases and arguments considered by the court before rendering its original decision fails to carry the moving party's burden." *Id.* at 856-57 (citing cases). Accord, *Tischio v. Bontex, Inc.*, 16 F.Supp. 2d 511, 532 (D.N.J. 1998) (explaining that a motion for reconsideration is not properly grounded on a request that a court rethink a decision it already made). Here, Aloe Energy's Rule 59(e) motion is based on an argument it previously submitted which the Court considered in ruling on the parties' cross-motions for summary judgment. For this reason alone, the plaintiff's present motion should be rejected.

Nonetheless, we will revisit Aloe Energy's argument that Mr. Boich's reporting of income from his coal brokering

activities on Schedule C of his federal income tax return compelled a findings that Mr. Boich was involved in such business with continuity and regularity. Our review of SSA's decisions affirming the defendant's assignment of miners in this case was limited to an "arbitrary and capricious" standard of review. As explained in the R & R, agency decisions, such as SSA's final decisions at issue here, "may be set aside only if arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law." *Humphreys v. Drug Enforcement Administration*, 96 F.3d 658, 660 (3d Cir. 1996), citing 5 .S.C. § 706(2)(A). The "arbitrary" and "capricious" standard of review is clearly a narrow one. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971). That is, a court is not empowered to substitute its judgment for that of the agency. *Id.* Further, a court should not set aside an agency action as arbitrary and capricious if its action is rational, based on relevant factors, and within the agency's statutory authority. *Motor Vehicle Mfrs. Ass'n. v. State Farm Mutual*, 463 U.S. 29, 42 (1983); *Pennsylvania Funeral Directors Ass'n. v. F.T.C.*, 41 F.3d 81, 85-86 (3d Cir. 1994). In deciding if an agency's action is rational, the court "must confine its review to the full administrative record that was before [SSA] at the time [it] made [its] decision", and consider whether the decision was based on factors which Congress intended the agency to consider. *C.K. v. New Jersey Dept. Of Health and Human Services*, 92 F.3d 171, 182 (3d Cir. 1996).

SSA's determination that Mr. Boich was not "in business" for purposes of the Coal Act was based on several factors. These factors included:

*Mr. Boich's sale of his sole proprietorship to Boich Mining, pursuant to which Boich Mining agreed to assume all employment obligations[2];

*SSA's aforementioned review of its electronic system of records, by which it determined the wages that were reported on Mr. Boich's EIN;

*SSA's above-discussed determination that Mr. Boich's earnings (especially his rental income on real estate investments), constituted passive income which, under its operating instructions, did not generally constitute a "business activity"; and

*SSA's reliance on the IRC criteria set forth in its operating instructions.

As to the latter factor--the IRC criteria at issue here--it is clear that SSA did not have access to Mr. Boich's tax returns when it determined that the coal brokerage fees he earned were based on sporadic activity. Indeed, Aloe Energy supplemented the Administrative Record during the course of this litigation to show that Mr. Boich reported income derived from coal brokering activities on Schedule C.

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[2] As recounted in our R & R, effective November 1, 1984, Mr. Boich transferred all of the assets used in his mining proprietorship to Boich Mining, and in connection with such transfer, Boich Mining agreed to assume and fulfill all employment agreements, labor contracts, sales agreements, lease obligations and commitments of Mr. Boich's sole proprietorship business.

However, the mere filing of a Schedule C tax form in certain years does not conclusively show that an individual's business activity has been continuous and regular. In fact, based upon a portion of the plaintiff's supplement to the Administrative Record in this cas3e, it is unclear whether Mr. Boich's activities in conjunction with brokerage fees he earned from 1985 through 1995 were continuous and regular or sporadic.[3]

Under our standard of review in this case, it is clear that "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer". *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984). Further, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. If the agency's interpretation of a statute is reasonable, a court may not disregard it, even if the court's construction of the statute may be different. *Id.* at p. 843-844.

In this case, we again find that SSA's interpretation of the term "business activity", which is not defined in the Coal Act, was reasonable. We also find that SSA's decisions upholding the defendant's assignment of retirees to Boich Mining were not arbitrary, nor capricious, and that there has not been a clear error of law or fact in this case.

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[3] See, Exhibit B to the plaintiff's present motion.

Therefore, for the reasons set forth above, it is recommended that the plaintiff's motion to alter or amend the judgment in this case be denied.

Within ten (10) days after being served with a copy, and party may serve and file written objections to this Report and Recommendation. Any party opposing the objections shall have seven (7) days from the date of service of objections to respond thereto. Failure to file timely objections may constitute a waiver of any appellate rights.

Respectfully submitted,

s/ Robert C. Mitchell
United States Magistrate Judge

Dated: September 27, 1999

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

[Dated July 27, 1999]

No. 98-1371

ALOE ENERGY CORPORATION,)
a Pennsylvania Corporation,)
Plaintiff,)
)
v.)
)
KENNETH S. APFEL,)
Commissioner of Social Security,)
Defendant.)
)

ORDER

AND NOW, this 27th day of July, 1999, after the plaintiff, Aloe Energy Corporation, and the defendant, Kenneth S. Apfel, filed cross-motions for summary judgment in the above-captioned case, and after a Report and Recommendation was filed by the United States Magistrate Judge, and the parties were granted ten days after being served with a copy to file written objections thereto, and upon consideration of the objections filed by the plaintiff, as well as responses to those objections filed by the defendant and by *amici curiae* Trustees of the United Mine Workers of

America, and upon independent review of the pleadings and the record, and the Magistrate Judge's Report and Recommendation, which is adopted as the opinion of this Court,

IT IS ORDERED that the plaintiff's motion for summary judgment (Docket No. 9) is granted only as to the Social Security Administration's decision refusing to provide it with Robert E. Jamison's earning records and/or to review his assignment to Aloe Coal company, that the defendant's cross-motion for summary judgment (Docket No. 13) is granted as to the Social Security Administration's decisions assigning the retirees at issue to Boich Mining Company, and that this case is closed.

s/ Donald E. Ziegler
United States District Judge

cc: All Counsel of Record

Honorable Robert C. Mitchell
United States Magistrate Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

[Dated June 10, 1999]

No. 98-1371

ALOE ENERGY CORPORATION,)
a Pennsylvania Corporation,)
Plaintiff,)
)
v.)
)
KENNETH S. APFEL,)
Commissioner of Social Security,)
Defendant.)
)

REPORT AND RECOMMENDATION

I. Recommendation:

It is respectfully recommended that the plaintiff's motion for summary judgment (Docket No. 9) be granted only as to the Social Security Administration's decision refusing to provide it with Robert E. Jamison's earnings records and/or to review his assignment to Aloe Coal Company, that the defendant's cross-motion for summary judgment (Docket No. 13) be granted as to the Social Security

Administration's decisions assigning the retirees at issue to Boich Mining Company , and that this case be closed.

II. Report:

Presently before the Court for disposition are cross-motions for summary judgment submitted by plaintiff Aloe Energy Corporation ("Aloe Energy") and defendant Kenneth S. Apfel, the Commissioner of Social Security.

Aloe Energy is the successor by merger to Boich Mining Company ("Boich Mining"), as well as the successor by merger to Aloe Coal Company ("Aloe Coal"). Plaintiff Aloe Energy commenced this action to challenge certain final decisions issued by the Social Security Administration ("SSA") which upheld the defendant's assignment of several retired miners and their dependents from the United Mine Workers of America to Boich Mining and to Aloe Coal as arbitrary, capricious, and an abuse of discretion.

Under the Coal Industry Retiree Health Benefit Act of 1992 (the "Coal Act"), 26 U.S.C. §§ 9701 et seq., the Commissioner of Social Security is required with respect to "assign each coal industry retiree who is an eligible beneficiary to a signatory operator which (or any related person with respect to which) remains in business 26 U.S.C. § 9706(a). the impetus for enactment of the Coal Act has been explained by the Third Circuit Court of Appeals as follows:

> In 1992, Congress enacted the [Coal Act] to ensure that retired coal miners and their dependents would continue to receive the

> health and death benefits they had been receiving since the 1040's pursuant to a series of collective bargaining agreements. By the late 1980's, problems had arisen that caused serious under-funding to the two benefit plans funding the miner's benefits. Fearing that the miners and their families would be left with no health or death benefits, Congress stepped in and passed the Coal Act, which provided a new funding mechanism under which the Commissioner of Social Security would assign miners to a coal industry employer based on the recency and longevity of a miner's employment. That employer then would be responsible for providing the funds for those miner's benefits.

*Anker Energy Corp. v. Consolidation Coal Company, 1999 WL 301735, *1 (3d Cir., May 14, 1999)*

The Coal Act directs the Commissioner of Social Security to assign financial responsibility to eligible coal industry retirees "either to a 'signatory operator' that formerly employed the retiree or to a 'related person' to the signatory operator." *R.G. Johnson Company v. Apfel*, 172 F.3d 890, 891 and 893 (D.C. Cir., 1999). The Coal Act defines a "signatory operator" as "a person which is or was a signatory to a coal wage agreement." 26 U.S.C. § 9701(c) (1). Under the Act, "employment of a coal industry retiree in the coal industry by a signatory operator shall be treated as employment by any related persons to such operator." 26 U.S.C. § 9706(b) (1) (a) (emphasis added).

The record shows that on various dates, the defendant assigned certain retired miners and their dependents to Boich Mining on the basis that the signatory operator that actually employed these miners - a sole proprietorship owned by Michael M. Boich and known as Boich Mining Company - was no longer in business, and that Boich Mining (the corporation at issue here) should receive the assignments because it was Michael M. Boich's successor, and thus a related company to him.[1] Aloe Energy disputes the propriety of these assignments to Boich Mining. It argues that Boich Mining was not a related person to Michael M. Boich, and further, that Michael M. Boich was "in business" as that term is defined in the Coal Act.

The defendant also assigned retired miner Robert E. Jamison to Aloe Coal in a letter dated June 30, 1995.[2] The plaintiff asserts that this assignment was improper, because Mr. Jamison never worked for Aloe Coal, and SSA wrongly refused to review his assignment on grounds that Aloe Energy did not timely contest Jamison's agreement, when in fact it never received the original notice of his agreement until October 2, 1996.

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[1] The retired miners assigned to Boich Mining were John D. krafton, thomas E. Kellar, George Lee, George Plantz, Bernard Bell, John Krafton, Floyd E. Bares, Diegeo Serge, Delmar Harrison, Victor Folino and Dean Skinner. See, plaintiff's first amended complaint at ¶¶ 10 and 18, and the defendant's answers thereto.

[2] See, plaintiff's first amended complaint at ¶ 25, and the defendant's answer thereto.

Aloe Energy asserts that SSA's decisions upholding these improper assignments of retirees has wrongly caused it to incur attorney's fees, costs, premium obligations and other expenses. It requests the Court to revoke SSA;s aforementioned assignments and to award it attorney's fees and costs. It has invoked the Court's jurisdiction pursuant to 28 U.S.C. §§ 1331, 1346 and 1361.

Agency decisions, such as SSA's final decisions at issue here, "may be set aside only if arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law." *Humphreys v. Drug Enforcement of Administration*, 96 F.3d 658, 660 (3d Cir. 1996), citing 5 U.S.C. § 706(2)(A).[3] The "arbitrary" and "capricious" standard of review is clearly a narrow one. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971). That is, a court is not empowered to substitute its judgment for that of the agency. *Id.* Further, a court should not set aside an agency action as arbitrary and capricious if its action is rational, based on relevant factors, and within the agency's statutory authority. *Motor Vehicle Mfrs. Ass'n. v. State Farm Mutual*, 463 U.S. 29, 42 (1993); *Pennsylvania Funeral Directors Ass'n. v. F.T.C.*, 41 F.3d 81, 85-86 (3d Cir. 1994). In deciding if an agency 's action is rational, the court "must confine its review to the full administrative record that was before [SSA] at the time [it] made [its] decision", and consider whether the decision was based on factors which Congress intended the agency to

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[3] We note that *de novo* review of agency decisions is warranted only where judicial proceedings are brought to enforce certain administrative actions, or where there are inadequate factfinding procedures in an adjudicatory proceeding. *Camp v. Pitts*, 411 U.S. 138, 142 (1973). Neither of those situations is applicable here.

consider. *C.K. v. New Jersey Dept. of Health and Human Services*, 92 F.3d 171, 182 (3d Cir. 1996).

With respect to the assignment of retired miners to Boich Mining, the record shows that effective November 1, 1994, Michael M. Boich, the sole owner and proprietor of Boich Mining Company, transferred all of the assets used in his mining proprietorship to Boich Mining, the corporation at issue here[4], and in connection with such transfer, Boich Mining agreed to "assume and fulfill all employment agreements, labor contracts, sales agreements, lease obligations, and like contracts, agreements and commitments of [Michael M. Boich's] sole proprietorship business."[5]

Clearly, SSA assigned the retirees at issue to Boich Mining based on this transfer. As explained by SSA in one of its reconsideration determinations:

> A contract was signed by Michael Boich and the new owner of Boich Mining Co. on October 31, 1984. In part it specified that the corporation 'shall assume and fulfill all

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[4] The assets transferred by Michael M. Boich to Boich Mining included: "All mined coal inventory and unmined reserves, machinery, equipment, tools, vehicles, real estate fixtures, improvements and buildings, office fixtures and furniture, permits, licenses, contracts, purchase orders, work 8in progress, accounts receivable and cash on hand", as well as "(a) 11 prepaid taxes, insurance premiums and similar items of prepaid expense." See, the Administrative Record at pp. 85-86.

[5] See, the Administrative Record at pp. 82-83 and 85-86.

> employment agreements, labor contracts, sales agreements, lease obligations, and like contracts, agreements and commitments' of Michael Boich's sole proprietorship business. It is obvious from this that Mr. Boich sold all the rights and obligations of his mining enterprise to the present company. Accordingly, the present Boich Mining Co. is in fact the successor company to Mr. Boich's prior mining enterprise. [W]hile Mr. Boich may still received compensation as part of his contract with the present Boich Mining Co., it does not mean that his prior enterprise is still in existence. It in fact confirms that the prior company was transferred to the present company . . . Personal liability cannot be given to Mr. Boich since the present company did take over the business and did accept the obligations attached to that business."[6]

SSA's reliance on this transfer agreement was not misplaced, for in *Anker Energy*, *supra*, the Third Circuit Court of Appeals determined that passage of the Coal Act did not abrogate pre-Coal Act contracts, such as for indemnification or reimbursement of future funding obligations. 1999 WL 301735, *17-*18.

In support of its decisions upholding the defendant's assignment of retirees to Boich Mining, SSA asserts that it "interprets the Coal Act to permit the imposition of liability

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[6] See, the Administrative Record at p. 120.

to the successors-in-interest to defunct signatory operators that, if they were still in business, would be obligated to pay for the health care benefits of their former employees and dependents."[7] This interpretation of the Coal Act is not irrational. Indeed, in *R.G. Johnson Co.*, *supra*, the Court of Appeals for the District of Columbia held that the term "related "person" should be interpreted to encompass a successor in interest to a signatory operator in order to give effect to Congress' intent. 172 F.3d at 895.

The Court in *R.G. Johnson Co.* acknowledged that the Coal Act's definition of "related person" does not expressly include successors, or successors in interest to a signatory operator. *Id.* at 894.[8] Still, the Court explained that one of Congress' purposes in enacting the Coal Act was "to identify

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[7] See, defendant's memorandum in support of its present motion at p. 11.

[8] The Coal Act provides that "[I]n general, [a] person shall be considered to be a related person to a signatory operator if that person is--(i) a member of the controlled group of corporations (within the meaning of section 52(a) [of the Internal Revenue Code]) which includes such signatory operator; (ii) a trade or business which is under common control (as determined under section 52(b) [of the Internal Revenue Code]) with such signatory operator; or (iii) any other person who is identified as having a partnership interest or joint venture with a signatory operator in a business within the coal industry, but only if such business employed eligible beneficiaries, except that this clause shall not apply to a person whose only interest is as a limited partner. A related person shall also include a successor in interest of any person described in clause (i), (ii), or (iii). 26 U.S.C. § 9701(c)(2)(A).

persons most responsible for plan liabilities in order to stabilize plan funding and allow for the provision of health care benefits to such retirees." *Id.* at 895, quoting Pub.L. No. 102-486, S 19142(a)(2), 106 Stat. 3037. Finding that a "literal application" of the Coal Act's definition of "related person" (to not include a successor in interest to a signatory operator) would not comport with Congress' aforementioned intent, the Court stated:

> We are faced, the, with one of those 'rare cases in which the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.' [citation omitted]. In such a circumstance, 'the intention of the drafters, rather than the strict language, controls.'

Id. at 895, quoting *United States v. Ron Pair Enters.*, 489 U.S. 235, 242 (1989). Thus, the Court in *R.G. Johnson Co.* held that "in order to give effect to Congress' intent..., section 9701 (c) (2) (A) must be construed to permit the assignment of a Fund beneficiary to the successor in interest of a signatory operators". 172 F.3d at 895. Based on that Court's ruling, it would appear that SSA's determination that the Coal Act permitted it to assign retirees to the Boich proprietorship's successor and successor in interest was neither arbitrary, nor capricious.[9]

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[9] We also agree that in cases as here, where SSA assigns retirees to a successor or successor in interest which purchased and continued the coal mining operation of a now-defunct signatory operator that formerly employed such retirees (and has assumed the employment obligations of the signatory operator), SSA advances

Aloe Energy also argues that SSA's assignment of retired miners to Boich Mining was erroneous because it wrongly determined that Michael M. Boich, the former owner of Boich Mining, was not "in business" at all relevant times. The Coal Act defines the term "business" as follows: "a person shall be considered to be in business if such person conducts or derives revenue from any business activity, whether or not in the coal industry." 26 U.S.C. § 9701 (c)(7) (emphasis added). Clearly, "th[is] statutory definition of 'in business' is broad." *Lindsey Coal Mining Company v. Chater*, 90 F.3d 688, 692 (3d Cir. 1996). In construing the Act's definition of "in business", our Court of Appeals recognized that a person need not conduct a business activity at all to be deemed "in business", so long as he derives revenue from a business activity. *Id.* Specifically, the Court explained in *Lindsey Coal Mining*:

> Because the 'conducts' prong is provided for separately, the 'derives revenue' prong does not require the party...to itself 'conduct' a business activity. Otherwise, the 'derives revenue' option would be surplusage, which cannot have been Congress's intent. By the statute's own terms, then, someone other than the 'signatory operator' may be the one engaging in the business activity.

Id.

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the Coal Act's statutory purpose of identifying persons most responsible for plan liabilities so as to stabilize plan funding.

SSA discerned that based upon Michael M. Boich's sale of his sole proprietorship to Boich Mining, pursuant to which Boich Mining agreed to assume all employment obligations, "[Michael M. Boich] is in no way connected with the operations of the current [Boich Mining]..., [and] [t]he fact that Michael M. Boich still receives royalties from the sale in no way obligates him personally under the 1992 Coal Act."[10] The record shows that from 1985-1996, Michael M. Boich earned coal brokerage fees from various sources which he reported as income on Schedule Co of his federal income tax returns.[11] From 1983-1997, Mr. Boich also received rental income from four real estate investments in which he owned an interest which he reported on Schedule E of his federal income tax returns.[12] A summary of Michael M. Boich's income derived from his aforementioned brokerage fees and real estate investments indicates that from 1984 through 1997, he averaged in excess of $500,000 per year.[13]

According to SSA, it determined that Michael M. Boich was not "in business" for purposes of the Coal Act during those time periods, because although Mr. Boich earned substantial passive income from his investments, the record failed to show that he was actively engaged in a business

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[10] See, Administrative Record at pp. 327-328.

[11] See, plaintiff's motion to supplement the Administrative Record at Exhibit B.

[12] *Id*

[13] *Id*. at Exhibit D.

activity within the meaning of the Coal Act.[14] SSA asserts that because the Coal Act is silent on what constitutes "business activity", it looked to the Internal Revenue Code ("IRC") for guidance in implementing the statute. IN connection therewith, SSA developed instructions for determining if a company is engaging in a "business activity" based upon the following criteria set fort in the IRC for determining activity that constitutes a "trade or business" for which expenses may be deducted under 26 U.S.C. §162:

> (1) The primary purpose for engaging in the activity is to earn a livelihood or profit; and
>
> (2) The activity entails some type of economic activity and has a profit motive; and
>
> (3) The person is involved in the activity with continuity and regularity.[15]

As set forth in SSA's operating instructions: "If the activity meets all of the above criteria, then the company is engaging in a 'business activity'."[16]

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[14] See, defendant's memorandum in support of its present motion at p. 26.

[15] *Id.* at pp. 26-27; also see, Supplemental Coal Act Review Instructions #3, section N (at p. 26), which is attached to the defendant's memorandum.

[16] See, Supplemental Coal Act Review Instructions #3, section N (at p. 26) (emphasis in original).

It is SSA's position that the brokerage fees earned by Mr. Boich do not satisfy the third criteria, above, as such fees were based on sporadic activity, not activity that he was involved in with continuity and regularity. SSA also avers that Mr. Boich's earnings, especially his rental income on real estate investments, constitutes passive income, and under its operating instructions:

> Passive investments, such as interest earned on a corporate account, dividends received from stock investments, passive rental income, income from leases, etc., usually do not constitute a 'business activity'.[17]

In addition, SSA asserts that when ascertaining "business activity", it reviews its electronic system of records to determine if wages were reported under a signatory operator's employer identification number ("EIN"). The record supports SSA's assertion that:

> In Mr. Boich's case, reporting activity on his EIN stopped after 1984. Mr. Boich reported $1,888,466.42 in wages paid in 1983; $1,680,842.23 in 1984 and none in the years 1985, 1986, 1987, 1988 and 1989... In 1990, Mr. Boich paid out wages of $16,150.00; in 1991, $23,050.00; and $23,800.00 in 1992...

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[17] *Id.* (at p. 27).

> No wages have been reported in subsequent years.[18]

Based on these wage reports, SSA found that there was no business activity after 1984. This finding, combined with its determination that Mr. Boich's revenue was derived from passive income and entailed only sporadic activity, led SSA to conclude that Mr. Boich was not "in business" for purposes of the Coal Act.

It is clear that "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer". *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984). Further, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. If the agency's interpretation of a statute is reasonable, a court may not disregard it, even if the court's construction of the statute may be different. *Id.* at p. 843-844.

In this case, SSA's interpretation of the term "business activity" (which is not defined in the Coal Act) was reasonable, as it was based on relevant IRC criteria and guidelines set forth in its aforementioned operating instructions. Thus, based on the foregoing, we find that

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[18] See, defendant's memorandum in support of its present motion at p. 29, citing to several unnumbered pages in the Administrative Record located between pp. 16-18.

SSA's decisions upholding the assignment of retirees to Boich Mining were not arbitrary or capricious.

With respect to the assignment of Robert E. Jamison to Aloe Coal, the record shows that SSA assigned Mr. Jamison to Aloe Coal in a notice of assignment dated June 30, 1995.[19] In relevant part, SSA regulations provide:

> After you receive our notice of assignment listing the beneficiaries for whom you have premium responsibility, you may request detailed information as to the work histories of any of the listed miners and the basis for the assignment. Your request for detailed information must:
> (1) Be in writing;
> (2) Be filed with us within 30 days of receipt of that notice of assignment.
> Unless you submit evidence showing a later receipt of the notice, we will assume the notice was received by you within 5 days of the date appearing on the notice.

20 CFR § 422.604(a) (emphasis added).

In a letter dated October 2, 1996, James S. Birsic, Assistant Secretary of Aloe Coal, informed SSA that "[i]t has just been brought to our attention that [Robert E. Jamison] has been assigned to our company...please be so kind as to provide us with Mr. Jamison's earnings records upon which

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[19] See, Administrative Record at pp. 350-359.

such assignment was based."[20] SSA denied Mr. Birsic's request, explaining in a letter dated February 20, 1997:

> Aloe Coal Company must have asked for the earnings record no later than 30 days from the receipt of the assignment letter. We assume a letter is received 5 days after the date of the letter, unless evidence is presented that would prove a later receipt. According to our records, Aloe Coal Company should have requested a review by August 4, 1995. (The assignment letter was dated June 30, 1995...) Since we did not receive your request until October 12, 1996 (your letter dated October 2, 1996), we cannot send you the earnings record or review the assignment.[21]

Plaintiff Aloe Energy has submitted evidence showing that it did not receive SSA's June 30, 1995 notice of assignment until October 2, 1996. As set forth in the declaration of James S. Birsic, who was responsible for reviewing SSA's assignments of retirees to Aloe Energy and other subsidiaries of Aloe Mining Corporation, it was not until early October, 1995, that he first learned of Mr. Jamison's assignment to Aloe Coal when he saw Jamison's name on a bill received from the United Mine Workers of

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[20] Id. at p. 364.

[21] Id. at p. 369.

America Combined Benefit Fund ("Combined Fund").[22] According to Mr. Birsic:

> Once I learned that Mr. Jamison had been assigned to Aloe Coal Company, I contacted the Combined Fund to help me obtain a copy of SSA's Notice of Assignment. To the best of my knowledge, Aloe Coal Company never previously received any such Notice from SSA... Eventually, on or about October 2, 1996, I received, for the first time, a copy of SSA's June 30, 1995 Notice assigning Mr. Jamison to Aloe Coal Company. I do not recall if a copy of the Notice came from the Combined Fund or SSA, but it did come from one of the two of them. I promptly wrote to SSA asking for the wage records concerning Mr. Jamison so that I could determine whether he was properly assigned to Aloe Coal Company. Aloe Coal Company has received numerous Notices of Assignments from SSA since the Fall of 1993. Such Notices were promptly delivered to me by Aloe Coal Company... [and the] Company and I were quite familiar with the assignment and review process. For that reason, I find it hard to believe that Aloe Coal Company actually received SSA's June 30, 1995 Notice of

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[22] See, Declaration of James S. Birsic (attached as Exhibit E to the plaintiff's motion to supplement the Administrative Record) at ¶¶ 1-2.

> Assignment concerning Mr. Jamison before I saw it on or about October 2, 1996, and negligently failed to follow our normal procedure of promptly delivering the Notice to me so that Aloe Coal Company's outside counsel or I could request the miner's wage records.[23]

SSA does not contradict, nor contest the veracity of Mr. Birsic's declaration. Thus, it would appear that based upon the submission to SSA of this "evidence showing a later receipt of the notice" by Aloe Coal, 20 CFR §422.604(a), SSA's refusal to provide Aloe Coal with Mr. Jamison's earnings records and/or to review his assignment was arbitrary, capricious and an abuse of discretion.

Therefore, for the reasons set forth above, it is recommended that the plaintiff's motion for summary judgment be granted only as to SSA's decision refusing to provide it with Robert E. Jamison's earnings records and/or to review his assignment to Aloe Coal, that the defendant's cross-motion for summary judgment be granted as to SSA's decisions assigning the retirees at issue to Boich Mining, and that this case be closed.

Within ten (10) days after being served with a copy , any party may serve and file written objections to this Report and Recommendation. Any party opposing the objections shall have seven (7) days from the date of service of

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[23] *Id.* at ¶¶ 3-6.

objections to respond thereto. Failure to file timely objections may constitute a waiver of any appellate rights.

Respectfully submitted,

s/ Robert C. Mitchell
United States Magistrate Judge

Dated June 10, 1999

Supreme Court, U.S.
FILED
FEB 7 2001
OFFICE OF THE CLERK

No. 00-725

In the Supreme Court of the United States

ALOE ENERGY CORPORATION, PETITIONER

v.

KENNETH S. APFEL, COMMISSIONER OF SOCIAL SECURITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT

BARBARA D. UNDERWOOD
Acting Solicitor General
Counsel of Record
STUART E. SCHIFFER
Deputy Assistant Attorney General
MARK B. STERN
DANIEL L. KAPLAN
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

The Coal Industry Retiree Health Benefit Act of 1992 (Coal Act), 26 U.S.C. 9701 *et seq.*, established the United Mine Workers of America Combined Benefit Fund (Fund) to ensure the continued provision of health-care benefits to retired miners and their dependents who worked under collective bargaining agreements that promised lifetime health-care benefits. For the purpose of calculating premiums to be paid to the Fund to finance those health-care benefits, the Coal Act directs the Commissioner of Social Security to assign responsibility for beneficiaries of the Fund to the "signatory operator" or "related person" of the signatory operator that formerly employed them, if that signatory operator (or related person) is still "in business." 26 U.S.C. 9706(a).

The question presented is whether the Coal Act permits the Commissioner to assign beneficiaries to the successor in interest of a signatory operator that is no longer in business.

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In the Supreme Court of the United States

No. 00-725

ALOE ENERGY CORPORATION, PETITIONER

v.

KENNETH S. APFEL, COMMISSIONER OF SOCIAL SECURITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is unpublished, but the decision is noted at 225 F.3d 648 (Table). The orders of the district court (Pet. App. 16a-17a, 30a-31a) are unreported, as are the reports and recommendations of the magistrate judge (Pet. App. 18a-29a, 32a-50a).

JURISDICTION

The judgment of the court of appeals was entered on June 20, 2000. On September 8, 2000, Justice Souter entered an order extending the time within which to file a petition for a writ of certiorari to and including November 2, 2000, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Congress enacted the Coal Industry Retiree Health Benefit Act of 1992 (Coal Act or Act), 26 U.S.C. 9701 *et seq.*, in response to a crisis that threatened to deprive more than 100,000 retired coal miners and their dependents of promised lifetime health-care benefits. In the 1980s and 1990s, the financial stability of private multi-employer plans set up by the coal industry to finance those benefits was threatened by increasing health-care costs and the termination of employers' contribution obligations when they switched to non-union employees or left the coal mining business altogether. As more companies stopped contributing to the plans, the remaining contributors were forced to shoulder more of the costs, which in turn led to even more defections and created a downward spiral. See generally *Eastern Enters.* v. *Apfel*, 524 U.S. 498, 504-514 (1998) (plurality opinion).

Congress's objectives in enacting the Coal Act were to "identify persons most responsible for plan liabilities in order to stabilize plan funding and allow for the provision of health care benefits to [coal industry] retirees," to "allow for sufficient operating assets for [coal industry retiree health-care benefit] plans," and to "provide for the continuation of a privately financed self-sufficient program for the delivery of health care benefits to the beneficiaries of such plans." Energy Policy Act of 1992, Pub. L. No. 102-486, § 19142, 106 Stat. 3037. In furtherance of those ends, the Coal Act established the United Mine Workers of America Combined Benefit Fund (Combined Fund or Fund), a private multi-employer health benefit plan. The Combined Fund provides health-care benefits to beneficiaries who, at the time of passage of the Act, were

receiving (or were eligible to receive) benefits from multi-employer plans established by collective bargaining in the coal industry. See 26 U.S.C. 9702, 9703(f). The Combined Fund is financed by premiums paid by the "signatory operator[s]," or "related person[s]" of the signatory operators, that formerly employed the beneficiaries and that remain "in business." 26 U.S.C. 9704, 9706(a). The Act defines "signatory operator" as "a person which is or was a signatory to a coal wage agreement." 26 U.S.C. 9701(c)(1). The particular collective bargaining agreements with the United Mine Workers of America (Union) governing the coal industry that are included within the term "coal wage agreement" are set forth in 26 U.S.C. 9701(b)(1).

b. The Act delegates to the Commissioner of Social Security[1] (Commissioner) the task of assigning eligible beneficiaries to signatory operators or related persons. 26 U.S.C. 9706(a). Assignments are made according to a three-tiered hierarchy.

The Commissioner must first seek to assign a beneficiary to the "signatory operator" (or "related person") that remains "in business," signed a collective bargaining agreement with the Union in 1978 or later, and was the most recent signatory operator to employ the miner in the coal industry for at least two years. 26 U.S.C. 9706(a)(1). The Act specifies that "a person shall be

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[1] Many references in the legislative record are to the Department of Health and Human Services, which at the time included the Social Security Administration. In 1995, the Social Security Administration became an independent agency within the Executive Branch, and the Commissioner of Social Security assumed the duties of the Secretary of Health and Human Services under the Coal Act. See Social Security Independence and Program Improvements Act of 1994, Pub. L. No. 103-296, § 108(h)(9)(A), 108 Stat. 1487.

considered to be in business if such person conducts or derives revenue from any business activity, whether or not in the coal industry." 26 U.S.C. 9701(c)(7).

If an assignment of a particular beneficiary cannot be made under the first tier, the Commissioner must then attempt to assign the beneficiary to the signatory operator (or its related person) that remains "in business," signed a collective bargaining agreement with the Union in 1978 or later, and was the most recent signatory operator to employ the miner in the coal industry for any period of time. 26 U.S.C. 9706(a)(2).

If an assignment cannot be made under the first or second tiers, the Commissioner must then seek to assign the beneficiary to the signatory operator (or its related person) that remains "in business" and employed the miner in the coal industry for a longer period of time than any other signatory operator prior to the effective date of the 1978 collective bargaining agreement. 26 U.S.C. 9706(a)(3).[2]

If an assignment cannot be made under any of the three tiers, then the beneficiary is considered "unassigned," and his health-care benefits are funded with certain funds transferred from interest earned on the Abandoned Mine Reclamation Fund established by the Surface Mining Control and Reclamation Act, see 26 U.S.C. 9705(b), or, if that source of funds is ex-

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[2] In *Eastern Enterprises*, this Court struck down as unconstitutional an application of the third tier under which the Commissioner assigned a beneficiary to a coal mine operator that had not signed a collective bargaining agreement with the Union in 1974 or later. See 524 U.S. at 504 (plurality opinion); *id.* at 539 (opinion of Kennedy, J., concurring in the judgment and dissenting in part). The *Eastern Enterprises* decision is not directly relevant to this case, which does not involve assignments made under the third tier.

hausted or unavailable, from an additional premium imposed in a *pro rata* fashion on all signatory operators to which retired miners have been assigned. 26 U.S.C. 9704(d). Congress understood that a principal cause of the financial instability of the multi-employer plans in existence before the Combined Fund was the problem of retirees whose employers had terminated their contribution obligations, and so it intended that the number of unassigned beneficiaries under the Coal Act be kept to "an absolute minimum." 138 Cong. Rec. 34,003 (1992) (technical explanation by Sen. Wallop).

Because the Commissioner must determine whether a beneficiary can be assigned to either a signatory operator *or* any related person to a signatory operator under the first tier before proceeding to the second tier, and then to a signatory operator in the second tier before proceeding to the third, the concept of "related person" is fundamental to the operation of the Act. The Act sets forth the following explication of the kinds of relationships between entities that shall lead the Commissioner to consider an entity to be a "related person" to a signatory operator:

> A person shall be considered to be a related person to a signatory operator if that person is—
>
> (i) a member of the controlled group of corporaions (within the meaning of [26 U.S.C.] 52(a)) which includes such signatory operator;
>
> (ii) a trade or business which is under common control (as determined under [26 U.S.C.] 52(b)) with such signatory operator; or
>
> (iii) any other person who is identified as having a partnership interest or joint venture

> with a signatory operator in a business within the coal industry, but only if such business employed eligible beneficiaries, except that this clause shall not apply to a person whose only interest is as a limited partner.
>
> A related person shall also include a successor in interest of any person described in clause (i), (ii), or (iii).

26 U.S.C. 9701(c)(2)(A).

Although Congress expressly provided for assignments to be made to the successor in interest to a person "related" to the signatory operator, the Coal Act does not state *in haec verba* that an assignment may be made to a direct successor in interest to the signatory itself. The Commissioner has concluded, however, that in light of the text, structure, and purposes of the Coal Act, Congress intended to reach those successors as well. See Social Security Administration Supplemental Coal Act Review Instructions No. 4 (July 1995); App., *infra*, 1a-12a. The Commissioner has, in addition, concluded that a business should be deemed a successor in interest to a signatory operator or other related person if it has, through purchase, merger, or other transaction, acquired substantial assets from the signatory operator or its related person, if it continues running the same operation in the same location, and if it uses many of the same employees who worked for the former owner. *Id.* at 4a.

c. When the Commissioner assigns a Combined Fund beneficiary to a signatory operator or related person, he so notifies the assigned operator, 26 U.S.C. 9706(e)(2), which then has 30 days to request "detailed information as to the work history of the beneficiary and the basis of the assignment," 26 U.S.C. 9706(f)(1).

After receiving that information, the assigned operator has an additional 30 days to request review of the assignment decision. 26 U.S.C. 9706(f)(2). If, on review, the Commissioner determines that an assignment was incorrect, he rescinds the assignment and reviews the beneficiary's record to determine whether the beneficiary should be assigned to another operator. 26 U.S.C. 9706(f)(3)(A). If the Commissioner determines that there was no error in the assignment, he so notifies the assigned operator. 26 U.S.C. 9706(f)(3)(B).

2. The 11 retired miners at issue in this case all worked for Boich Mining Company (Boich I), a business that, before 1984, was owned and operated by Michael M. Boich as a sole proprietorship. Pet App. 3a-4a, 35a n.1. In 1984, after the 11 miners had left the employ of Boich I, Michael Boich transferred all of the business's assets and liabilities (with exceptions not relevant here) to a newly formed corporation also known as Boich Mining Company (Boich II). In exchange for that transfer, Michael Boich received all of the shares of Boich II. *Id.* at 3a, 37a-38a. In 1986, an affiliate of petitioner Aloe Energy Corporation (Aloe) purchased all the shares of Boich II, and in 1996, Boich II was merged into Aloe. *Id.* at 3a.

In a series of decisions rendered between 1993 and 1997, the Commissioner assigned responsibility for the 11 miners to Boich II, as the successor in interest to Boich I. See Pet. App. 4a. The company sought further administrative review of the assignments, arguing, *inter alia*, that the Commissioner was not authorized under the Coal Act to assign retired miners to the successor of a signatory operator when the signatory

operator is no longer "in business." See *id.* at 32a-40a.[3] The Commissioner reaffirmed the assignments, finding nothing in the language of the Coal Act that would prevent assigning retired miners to their employer's successor. See *id.* at 4a-5a, 33a, 35a, 37a-38a.

3. Petitioner then filed a complaint in the district court, challenging the Commissioner's assignments. Petitioner argued centrally that the Coal Act does not authorize the Commissioner to assign responsibility for a miner to the direct successor in interest of the signatory operator that actually employed the miners. Petitioner argued that, although the Coal Act expressly defines "related person" to include successors in interest of corporations that are themselves related to signatory operators (such as other corporations within the same controlled group, see 26 U.S.C. 9701(c)(2)(A)), it does not expressly provide for the assignment of retired miners to a successor in interest to the signatory operator itself.

The district court granted the Commissioner's motion for summary judgment with regard to the issue of assignment to successors. See Pet. App. 30a-31a. Adopting the Report and Recommendation of a magistrate judge (see *id.* at 32a-50a), the district court agreed (*id.* at 38a-40a) with the reasoning and conclusion of the District of Columbia Circuit in *R.G. Johnson Co.* v. *Apfel*, 172 F.3d 890, 894-896 (1999), which held that the Coal Act authorizes the Commissioner to treat the

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[3] Petitioner also argued that the Commissioner was required to assign the miners to Mr. Boich personally, because he remained "in business." See Pet. 9 n.6. The court of appeals rejected that argument, Pet. App. 9a-12a, and petitioner has not renewed it in this Court.

direct successor in interest to a signatory operator as a "related person" to whom an assignment may be made.

4. The court of appeals affirmed in an unpublished decision.[4] Pet. App. 1a-13a. Like the district court, the court of appeals adopted the reasoning and conclusion of the *R.G. Johnson* decision, and held that the Coal Act authorizes the Commissioner to assign Combined Fund beneficiaries to the successor in interest of a signatory operator if the signatory operator is no longer in business. See Pet. App. 7a-8a. The court noted that the *R.G. Johnson* court had found this "successor in interest" issue to present "one of those rare cases in which the literal application of a statute will produce a result demonstrably at odds with the intentions of the drafters." *Id.* at 8a (internal quotation marks omitted). The court also remarked that unless Section 9701(c)(2)(A), defining "related person," is construed to permit the assignment of eligible beneficiaries to the successor of a signatory operator, "Congress' aim to create stable and self-sufficient retirement plans by identifying the parties most responsible would be eviscerated." *Ibid.*[5]

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[4] The court of appeals subsequently denied the government's motion for publication of the decision.

[5] In a footnote (Pet. App. 8a n.5), the court of appeals also observed that it might have been able to uphold the assignment of the 11 miners to Boich II under a narrower "same entity" or "alter ego" theory, as "the only real difference between Mr. Boich's sole proprietorship and [Boich II] as a corporation was a technical change of form." The court did not resolve the case on that basis, however, because it stated that that argument had been raised by the government for the first time on appeal, and so instead it upheld the district court's determination that the Commissioner had properly assigned the miners to Boich II under the broader, successorship theory. *Ibid.*

DISCUSSION

The court of appeals in this case correctly upheld the Commissioner of Social Security's determination that the Coal Act permits the Commissioner to assign responsibility for a miner's health-care benefits to the direct successor in interest of a signatory operator that employed the miner, when that signatory operator itself is no longer in business. In view of the circuit conflict on that question and its importance in the administration of the Coal Act, however, we suggest that the Court grant the petition for a writ of certiorari in this case.

Although the court of appeals' decision is unpublished, it expressly adopts the reasoning and holding of the District of Columbia Circuit's published decision in *R.G. Johnson Co.* v. *Apfel*, 172 F.3d 890, 894-896 (1999), which also upheld a decision by the Commissioner to assign responsibility for a retired miner's benefits to the direct successor in interest of the signatory operator that employed the miner. Subsequently, the Fourth Circuit rejected the *R.G. Johnson* court's reasoning and holding, and reached a contrary conclusion in its published decision in *Sigmon Coal Co.* v. *Apfel*, 226 F.3d 291 (2000).[6] In *Sigmon*, the Fourth Circuit held that the Coal Act does not permit the Commissioner to assign responsibility for a retired miner's benefits to the direct successor of a signatory operator. *Id.* at 303-309.[7]

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[6] The First Circuit had reached the same conclusion as the Fourth Circuit in *Eastern Enterprises* v. *Chater*, 110 F.3d 150, 154-155 (1997), which this Court reversed on other grounds in *Eastern Enterprises* v. *Apfel*, 524 U.S. 498 (1998).

[7] The Fourth Circuit denied the government's petition for rehearing and rehearing en banc in *Sigmon*. The Acting Solicitor General has authorized the filing of a petition for a writ of certio-

There is therefore a conflict among the circuits, reflected in published decisions, as to whether the Commissioner may assign responsibility for a miner's health-care benefits under the Coal Act to the direct successor in interest of the signatory operator that employed the miner. That question is of substantial importance to the proper operation of the Coal Act. Congress expressly declared in the Coal Act that one of its purposes is "to identify persons most responsible for plan liabilities in order to stabilize plan funding and allow for the provision of health care benefits to" retirees and their dependents. Energy Policy Act of 1992, Pub. L. No. 102-486, § 19142(a)(2), 106 Stat. 3037. Congress also enacted the "related person" provisions of the Coal Act because it was aware that the coal industry had been marked by frequently shifting corporate forms, and it did not want signatory operators to avoid responsibility through corporate reorganization. See 138 Cong. Rec. 34,002 (1992) (technical explanation of Sen. Wallop) ("[B]ecause of complex corporate structures which are often found in the coal industry, the number of entities made jointly and severally liable for a signatory operator's obligations under the definition of related persons is intentionally very broad."). Congress therefore anticipated that direct successors in interest of signatory operators could be responsible for the health-care benefits of miners when their employers were no longer in business. See *ibid.* (explanation of Sen. Wallop) (Act's definition of "related person" includes "in specific instances successors to the collective bargaining agreement obligations of a signatory opera-

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rari seeking review of the decision of the Fourth Circuit in *Sigmon*. That petition is currently due to be filed in this Court by February 13, 2001.

tor"); *id.* at 34,033 (remarks of Sen. Rockefeller) ("The term 'signatory operator,' as defined in new section 9701(c)(1), includes a successor in interest of such operator.").

The Commissioner's authority to assign beneficiaries of the Combined Fund to an out-of-business signatory operator's successor in interest is implicated in many assignment decisions.[8] The Fourth Circuit's conclusion that no such authority exists could significantly undermine Congress's determination that corporate entities closely related to the signatory operator should be responsible for the signatory operator's obligations, and could also jeopardize the Fund's financial stability. If the Commissioner may not assign responsibility for a signatory operator's employees to a direct successor in interest of that signatory, he will be required to assign responsibility to entities that are more distantly related to the signatory operator, such as successors in interest of other corporations within the same control group (which, petitioner acknowledges, would be a proper assignment under the Coal Act). If no such entities exist, then the Commissioner must deem the beneficiaries to be "unassigned," in which case their health-care benefits must be financed by transfers from the Abandoned Mine Reclamation Fund or (if those transfers are insufficient) contributions from other former signatory

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[8] We have been informed by the Social Security Administration (SSA) that about 16,500 beneficiaries have been assigned to entities deemed "related" to an original signatory operator under the Coal Act's "related person" provisions. Although the SSA has not conducted a manual search of its records to determine how many of those "related person" assignments were made on the basis of a direct-successorship, the SSA believes that direct-successor assignments constitute a substantial proportion of those assignments.

operators, which did not employ them. Those possibilities are contrary to Congress's intent that financial responsibility for miners' benefits be placed on those entities most responsible for plan liabilities.

Accordingly, in light of the conflict between published decisions of the courts of appeals and the importance of the issue presented, the petition for a writ of certiorari should be granted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

BARBARA D. UNDERWOOD
Acting Solicitor General
STUART E. SCHIFFER
Deputy Assistant Attorney General
MARK B. STERN
DANIEL L. KAPLAN
Attorneys

FEBRUARY 2001

APPENDIX

FURNISHING EARNINGS INFORMATION
July 1995

SUPPLEMENTAL COAL ACT REVIEW INSTRUCTIONS #4
July 1995

These instructions reflect the current policy, and are to be used in conjunction with POMS RM T01402ff and Supplemental Coal Act Review Instructions #1, #2 and #3.

A. DETERMINING THE ASSIGNEE WHEN THE SIGNATORY OPERATOR IS INACTIVE

Coal Act assignments, whenever possible, are made to the signatory operator that employed the miner in the coal industry. However when this is not possible because the signatory operator is inactive, then consider the following when determining the correct assignee.

1. If the signatory operator, or its "alter ego" (see Section B. below) is inactive;

Then make the assignment to the active person (company) related to the signatory operator that employed the miner in the coal industry (see Section C. below).

2. If the related person (company) is inactive;

Then make the assignment to the active "successor/ successor-in-interest" ("successor") to:

a. a related person of the signatory operator; or if none

b. the signatory operator that employed the miner in the coal industry.

(See Section D. below.)

B. AN "ALTER EGO"

An "alter ego" is created when the same person(s) (company) controls the assets of a company following a *technical* change of identity or structure without any real change in ownership or management (e.g., the "alter ego" is, or stands in the place of, the signatory operator).

A business reorganization may have the appearance of creating a "successor" company when, in fact, there is no change in ownership. Therefore, the new company is merely an "alter ego" of the predecessor company.

Examples of an "alter ego" are:

- A sole proprietor who incorporates a business, but continues to control its operations.

- A company which changes its name, but continues to operate as before.

For assignment purposes under the Coal Act, treat an "alter ego" the same as you would treat its predecessor (e.g., as if there had been no change in ownership).

C. A "RELATED PERSON"

For purposes of the Coal Act, a "related person" (company) is a company that is:

- a member of a controlled group of corporations which includes the signatory operator; or
- a trade or business which is under common control with the signatory operator; or
- any other person who has a partnership interest (other than as a limited partner) or joint venture with a signatory operator in a business in the coal industry, if that business employed eligible miners.

In addition, the relationship had to have been in effect as of July 20, 1992 or, if earlier, the time immediately before the coal operator went out of business.

NOTE: A related person can also include a "successor" to one of the above entities, or a "successor" to the signatory operator.

D. A "SUCCESSOR" OR "SUCCESSOR-IN-INTEREST"

Addendum to POMS RM T01402.051, and Supplemental Coal Act Review Instructions # 3, Section O.

NOTE: This is a change-of-position on "successor company" policy, and is effective with decisions made on or after March 20, 1995.

Although there is a provision in the Coal Act for assignments to "successors" and "successors-in-

interest" to "related persons," the Coal Act does not specifically provide for assignments to "successors" or "successors-in-interest" to signatory operators. However, the Coal Act does permit assignments to "successors" and "successors-in-interest" to *defunct* (inactive) signatory operators.

Based on the above, "successors" and "successors-in-interest" are another type of "related person," and are to be treated as a "related person" for purposes of making assignments under the Coal Act. (Also see Section D.2. below.)

1. A "successor" (this includes the "successor-in-interest") is one who:

- by purchase, merger, consolidation, or other means of transfer, acquires substantial assets from another; AND
- continues running the same operation in the same location as the former owner with little or no interruption; AND
- uses many of the same employees who worked for the former owner.

NOTE: The difference between a "successor" and an "alter ego" is that with the former there is an actual change in ownership.

2. "Successors" are the lowest priority (last resort) among "related persons" of a signatory. Therefore, do *not* assign miners to a "successor" if the signatory operator is still in *any kind* of business at the time the assignment is made, or if there is a "related person" as defined in Section C. above.

3. If the signatory is inactive, but has both a "successor" and a non-successor "related person" (company) that are still active;

Then make the assignment(s) to the non-successor "related person" (company).

E. ASSIGNING TO THE "SUCCESSOR TO THE SUCCESSOR"

A "successor" to a signatory operator may also have a "successor." In fact, there can be a series of such "successors."

EXAMPLE: Company A sold its mining operation to Company G which continues the operation at the same site using most of the same employees. Company G is the "successor" to Company A. Company G then sells the mining operation to Company H which continues the operation at the same site using most of the same employees.

Based on this example, Company H is the "successor" to Company G's mining operation.

For assignment purposes (and using the above example), if Company A is "out of business," but Company G is "in business," then the miners who worked for Company A can be assigned to Company G as the "successor" to Company A. However, if both Company A and Company G are "out of business," then the miners who worked for Company A can be assigned to Company H (the "successor to the successor" of Company A).

F. ASSUMPTIONS REGARDING "SUCCESSORS"

For assignment purposes, assume that inactive signatory operators do *not* have "successors" or "successors-in-interest," absent information to the contrary. However, if a "successor" or "successor-in-interest" issue is raised, and it is pertinent to the reassignment/review decision, request scouting from OCRO (e.g., obtain microfilm of the original wage reports for the inactive signatory and the "successor") to determine whether most of the former owner's employees were employed by the purchaser.

Other evidence of "successor relationships" can be found in State corporation records, remarks on the paper pre-1978 signatory list, and records maintained by the Fund.

G. EXAMPLES OF "SUCCESSOR" RELATIONSHIPS

EXAMPLE 1: Company W sold its mining operation to Company X. Company X continues the mining operation at the same site using most of the same employees that Company W had used. Company W goes "out of business."

Based on this example:

- Company X is the "successor" to Company W, and is assignable for any eligible miners employed by Company W; AND

- Company W is *not* assignable under the Coal Act because it is "not in business."

EXAMPLE 2: Company W sold its mining operation at Mine A to Company X. Company X continues the mining operation at the same site using most of the same employees that Company W had used. Company W continues mining operations at Mine B and Mine C.

Based on this example:

- Company X is the "successor" to Company W's mining operation at Mine A; BUT
- Company W remains assignable under the Coal Act because it is "in business."

EXAMPLE 3: Same as in Example 2, except Company W sold its Mine B mining operation to Company Y and its Mine C mining operation to Company Z. Company W then goes "out of business." Companies X, Y and Z continue the mining operations at the respective sites, and use most of the same employees that Company W had used.

Based on this example:

- Company X is the "successor" to Company W's mining operations at Mine A, and is assignable for any eligible miners employed by Company W at Mine A;
- Company Y is the "successor" to Company W's mining operation at Mine B, and is assignable for any eligible miners employed by Company W at Mine B;
- Company Z is the "successor" to Company W's mining operation at Mine C and is assignable for

any eligible miners employed by Company W at Mine C; AND

- Company W is *not* assignable under the Coal Act because it is "not in business."

EXAMPLE 4: Company D (a pre-78 signatory) reorganized and created a new company within its organization (Company J). Company J (a 1978 and later signatory) conducted mining operations at a different site, and hired different employees. Company D remained "in business" but sold Company J to Company T on January 9, 1990. Company T continued the mining operation at the same site using most of the same employees that Company J used. Company J goes "out of business."

Based on this example:

- Company T is the "successor" to Company J, and is assignable under the Coal Act (priority #1) for those miners it and/or Company J employed;

- Company D is assignable under the Coal Act (priority #3) for those miners it employed; AND

- Company J is not assignable under the Coal Act because it went "out of business."

EXAMPLE 5: Same as Example 4, except Company J was sold to Company T on December 2, 1992.

Based on this example:

- Company D and Company J are related persons under the Coal Act;

- Company D is assignable under the Coal Act (priority #3) for those miners it and/or Company J employed;

- Company T (the "successor" company) is not assignable under the Coal Act because Company D (the related company) is "in business;"

- Company J is not assignable under the Coal Act because it went "out of business."

EXAMPLE 6: Company R (a pre-78 signatory) had both mining and non-mining operations. Company R reorganized all of its non-mining operations under one sister corporation (Company QR), and its mining operations under another sister corporation (Company SR). Thereafter, Company R ceased to exist in its original corporate form. Aside from this change in corporate structure, Company QR and Company SR continued to operate under the same ownership and management as Company R. Company SR became a 1978 and later signatory. Both Company QR and SR remain "in business." Based on this example:

- Companies QR and Company SR did *not* create "successor" relationships to Company R; AND

- Company R's reorganization constitutes a continuation of the same operations; AND

- Both Company QR and Company SR are the "alter ego" of Company R.

Therefore, covered work for Company R and Company SR would be assigned to Company SR for purposes of making assignments under the Coal Act.

NOTE: The non-mining operation (Company QR) is not considered for purposes of Coal Act assignments unless Company SR is "out of business" at the time an assignment(s) is made.

H. PRIVATE AGREEMENTS BETWEEN SELLER AND BUYER

SSA is not bound, for Coal Act assignment purposes, by any private agreement between the seller and the buyer of coal mining assets as to the reimbursements to be made to the seller for past liabilities. That is, if the buyer of the coal mining assets agrees to indemnify (assume responsibility for) or reimburse the seller for employee/retirement costs, this does not mean that the assignment should be made to the buyer instead of the seller.

I. STATUS OF THE SELLER AFTER THE SALE

The status of the seller after the sale of its mining operation/assets determines whether it is assignable under the Coal Act.

1. If the seller (or a related company) remains "in business," AND has the highest priority for assignment;

Then make the assignment to the seller (or the related company).

2. If the seller (and any related companies) is "out of business," AND sold all of its assets to the buyer;

Then evaluate the purchase agreement, and the other evidence, to determine whether the sale created

a "successor" relationship with the buyer; AND make the assignment based on your determination.

J. DETERMINING WHERE TO MAIL NEW NOTICES OF ASSIGNMENT

Several assigned operators have already authorized, in writing, representatives to act on their behalf in administrative matters under the Coal Act. Based on these authorizations, we have mailed requested earnings records (and the basis for the assignments), Coal Act review decisions and/or correspondence to these authorized representatives. However, the authorizations already in file:

- were received before any additional assignments were made;
- are based on current reviews; and
- pertain to the administrative review process only.

Therefore, mail all new notices of assignment to the assigned operator.

EXCEPTION: See Section J.2. below.

* * * * *

months of the time SSA sent the notice of assignment;

Then reopen and reverse the decision, and use the language provided in Supplemental Coal Act Review Instructions #3, Section X, Exhibit 2, item 6.

b. If the evidence does not clearly reflect that our records are in error AND the decision to reopen is

made after 12 months of the time SSA sent the notice of assignment;

Then deny the request to reopen, and affirm the decision. (Use the language provided in Supplemental Coal Act Review Instructions #3, Section X, Exhibit 2, item 6.)

6. Assignee Alleges a "Successor Relationship" is Involved

Reopen and change the assignment/review decision if the assignee requests a reopening based on a "successor relationship" as clarified in Section D above—provided the assignment would have been made to the "successor" company under this clarification.

Also, reopen and change the assignment if you determine that a "successor relationship" is involved, AND the assignment would have been made to a "successor" company under this clarification.

NOTE: A "successor relationship" includes "successors" and "successors-in-interest."

M. UNDELIVERABLES

It is SSA's role to make assignments and review decisions, and to mail the appropriate notices to the assignees. It is the Fund's role to bill the assignees and collect the premiums.